IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1978
No. 78-75

ROBERT W. BATTIN,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

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United States
Supreme Court
Attorney for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION 2

[77 Cal. App. 3rd 635, Cal.Rptr.]

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now Robert W. Battin, Petitioner, by his attorney, Roger S. Hanson, Esq., a member of the Bar of the United States Supreme Court, presenting his petition for Writ of Certiorari to the Court of Appeal of

the State of California, Fourth Appellate District, Division 2, to review that certain published decision People v. Robert W. Battin, 77 Cal.App.3rd 635, —Cal.Rptr.—, January 18, 1978, which affirmed his conviction of a violation of 1 count of California Penal Code 424, subdivision 2, use of public moneys for any purpose not authorized by law.

Dated this 5th day of July, 1978, at Santa Ana, County of Orange, State of California.

ROGER S. HANSON, Esq.
Attorney for Petitioner
Member of the Bar
Supreme Court of the United States
Supreme Court of the State of California

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner submits the following:

[A.]

OPINION BELOW

The official and unofficial report and citation of the judgment herein sought review is People v. Battin, 77 Cal.App.3rd 635, —Cal.Rptr.—, January 18, 1978.

This opinion was rendered by Division 2 of the California Court of Appeal, Fourth Appellate District. A copy of this opinion is appended to this petition as Appendix "A".

[B.]

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is involved are:

(i) the date that the judgment which is sought to be reviewed was entered January 18, 1978. A copy of that judgment is attached as Appendix "A".

(ii) a petition for rehearing was made and denied on February 15, 1978. A copy of that order Denying Rehearing is attached as Appendix "B". The Supreme Court of California denied a Petition for Hearing on April 13, 1978. A copy of said order is attached as Appendix "C". All State Remedies have been exhausted, and the 90 day period during which Certiorari may be sought extends from April 14, 1978 through and including July 12, 1978.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257(3) which provides:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

. . . By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Jurisdiction of this Honorable Court is further invoked because the California Court of Appeal, 4th Appellate District, Division 2, has decided several federal questions wrongly, or has chosen to ignore deciding several other federal questions, and in deciding the enumerated federal questions, it has done so in a way:

(1.) not in accord with the Due Process reasoning of this Honorable Court in **Morissette v. United States**, 342 U.S. 246 (96L.Ed.2d 288, 72S.Ct.240) which provides that a criminal defendant may be convicted of a larceny related type of criminal offense if and only if the prosecution proves that, be-

yond a reasonable doubt that criminal defendant possessed the **specific criminal intent**, or **mens rea**, to deprive his victim, the government, of the property in question. The California Court of Appeal misconstrues **Morissette v. United States**, 342 U.S. 246, in the instant opinion, **People v. Battin**, 77 Cal. App. 3rd 635, 658-659, fn. 19 (pages ...of the opinion set forth as Appendix "A" this petition), and holds that petitioner may be convicted of this larceny related offense of misuse of public moneys even though he had no wrongful, evil, or larcenous intent. (Thus, the "**general criminal intent**" of the State of California, i.e., "there must exist a union or joint operation of act or conduct and '**General criminal intent.**' To constitute **general criminal intent it is not** necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with **general criminal intent**, even though he may not know that his act or conduct is unlawful. . .", was read to the petitioner's jury, and petitioner was convicted of the Penal Code 424, subdivision 2 offense;) he was acquitted of the myriad of counts brought under California Penal Code 72 on exactly **the same set of facts**, Penal Code 72 requiring the State to demonstrate the petitioner possessed the **specific criminal intent** coupled with the act; California's **specific criminal intent** is that intent

required to be demonstrated in **Morissette v. United States, 342 U.S. 246**; this court held in Morissette that non mens rea "general" criminal intent would not support a larceny-related conviction.

Thus, Certiorari should be granted, and jurisdiction is invoked to insure that as a matter of 14th Amendment Due Process of Law, no state shall prosecute and convict a criminal defendant of a serious larceny-related felony carrying a potential state prison sanction unless it demonstrates, beyond a reasonable doubt, that he acted with the specific criminal intent to deprive the governmental body of the moneys in question. **Morissette v. United States**, 342 U.S. 246; **In Re Winship**, 397 U.S. 358, 364.

(2.) not in accord with due due process reasoning of another District of the California Court of Appeal in **People v. Osborne**, (1978) 77 Cal. App. 3rd 472, decided a few days after petitioners conviction was affirmed; **Osborne**, supra, held that a California criminal defendant should be allowed to assert that his acts were accompanied with innocent, non-criminal intent, and if believed, said innocent intent would constitute a complete defense to a California crime charged under so-called 'General Criminal Intent" standards.

(3.) not in accord with the Due Process Reasoning of this Honorable Court in **Mullaney v. Wilbur**, 421

U.S. 684, 44L.Ed. 2d 508, 95 S.Ct. 1881, which provides that the state may not shift to a criminal defendant the proof of any element of a crime that the state is charging him with. The wording of California Penal Code 424 subsection 2 requires the state to prove that there is no provision in statutory law, case law, opinions of the Attorney General, Orange County Counsel, et al., for use of an Orange County Supervisor's staff to aid that supervisor in a quest for reelection to office; this attempt to "establish a negative" is, of course, not possible, so the state shifts the burden to the criminal defendant supervisor to require that criminal defendant supervisor to attempt to establish that some provision exists which would allow for the use of his staff peripherally in his campaign for reelection. This "shift of the burden" contravenes the Due Process mandates of this Honorable Court set forth in **Mullaney v. Wilburn**, 421 U.S. 684. The California Court of Appeals ignores this "shift of burden" contention in its published opinion, **People v. Battin**, 77 Cal. App. 3rd 635.

Jurisdiction of this Honorable Court is further invoked because the California Court of Appeals has denied the equal protection of the law to **Petitioner Battin**, a former Orange County Supervisor, while according the protection of the law to two current members of the Board of Supervisors, **Philip Anthony**

and Ralph Diedrich; the California Court of Appeal upheld the right of the Orange County Superior Court to disqualify Orange County District Attorney Cecil Hicks from prosecuting Supervisors Diedrich and Anthony because of personal involvement of District Attorney Hicks with those supervisors while denying reversal of Petitioner's conviction in 77 Cal. App. 3rd 635, although it is clear that the California Supreme Court in **People v. Superior Court [Greer]**, 19 Cal 3rd 255, 262, 264 has mandated that a District Attorney should not prosecute a criminal defendant while at the same time that District Attorney is involved in civil litigation with the criminal defendant and reversal of any conviction so obtained is mandated on appeal; that the District Attorney should not conduct the prosecution when ". . . he suffers from a conflict of interest which **might** prejudice him against the defendant and undermine his impartial exercise of judgment. . .", (19 Cal 3rd 255, 258), and reversal of any conviction so obtained is mandated on appeal. 19 Cal 3rd 255, 262, 264. Jurisdiction is invoked to insure that Due Process of law requires recusal of a state prosecutor who is so personally embroiled with a criminal defendant in a campaign of personal epithets and three major civil law suits that the said District Attorney can not exercise detached impartial judgment, and if said District Attorney refuses to recuse himself, reversal of any conviction so obtained is mandated.

Jurisdiction of this Honorable Court is further

invoked to resolve the constitutionality of California Penal Code 424, subsection 2, under the quartet of Federal constitutional attacks and assertions that it is:

(a.) Void for vagueness;

(b.) Unconstitutionally overly broad as applied in the case at bar;

(c.) deprives a criminal defendant of notice of what activity is prohibited; and is

(d.) an Ex Post Facto law insofar as it appears, to retroactively, to make a criminal act out of the use, by a California office holder, of his paid staff, to aid him in his quest for election to office in California, where as here, no other political figure in the United States has ever, at any time, been charged with the "crime" of using his paid staff to aid him, peripherally, in his quest for reelection, and where U.S. Congressional authority sanctions the act for members of the U.S. House of Representatives.

Finally, jurisdiction of this Honorable Court is invoked to urge that, as a matter of Due Process of law, a state prosecutorial office shall not be allowed to prosecute a state criminal defendant where that office is to be, and was, simultaneously key and material witnesses against that criminal defendant. The California Supreme Court has so ruled in **Comden v. Superior Court**, 20 Cal 3rd 906, —P.2d—, —Cal.Rptr— on April 11, 1978 after Petitioner's case was decided. Petitioner has thus been denied equal protection of the law by the State Appellate Courts. This appears to be

an issue of first impression before this Honorable Court.

[C.]

QUESTIONS PRESENTED FOR REVIEW

1. Whether California Penal Code 424 Subsection 2 violates the Federal Proscription against a statute being vague and overly broad, within the meaning of the decisions of this Honorable Court in **Connally v. General Construction Company** (1926) 269 U.S. 385, 391, **Papachristou v. City of Jacksonville** (1972) 405 U.S. 156, inasmuch as it fails to overtly set forth what behavior is deemed illegal, in view of the traditions existing in United States political circles which permitted an elected legislator to use his governmental paid staff to aid him in a campaign for reelection after all official work required to be done by that staff had in fact been performed?

2. Whether a state criminal statute denies due process of law per se where it fails to overtly specify what behavior or acts are deemed illegal?

3. Whether California Penal Code 424 subsection 2, as applied in this case, denies due process of law by failing to overtly set forth in salient terms what behavior or acts are deemed illegal and therefore denies Federal Constitutionally required Notice of the proscribed charges to a California criminal defendant?

4. Whether the State of California can prosecute as a felon, a duly elected county legislator supervisor,

in the absence of an overt statute prohibiting the peripheral use of a county paid staff in a campaign for reelection, within the meaning of the ex post fact clause, in view of such Federal authorization set forth at pages 127-128 of "Important Statutory and Regulatory Information and Accompany Forms Relating to the Election of Candidates to the U.S. House of Representatives".

5. Whether a California State criminal prosecution of a California crime of so-called "general criminal intent" violates the due process clause insofar as it precludes a California criminal defendant from introducing evidence of his "innocent intent" as a defense to the crime? (Note Bene, this California infirmity has ostensibly been corrected, three weeks after Petitioner's conviction was affirmed on January 18, 1978, by a different division of the California Court of Appeal in **People v. Osborne** (2-8-78) 77 Cal. App. 3rd 472).

6. Whether a California criminal defendant is denied due process of law by being denied the right: (a) to present, in defense, evidence of his "Innocent intent," and: (b) to have the jury instructed that "innocent intent" is a defense to a California "general intent" crime, and whether the California Jury instruction governing so-called "General Intent Crimes", to wit:

CALJIC 3.30

CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT

"In the crime charged in [Count . . . . . of] the information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful,"

violates a Constitutional proscription against conclusive presumptions in criminal cases where the consequence of that conclusive presumption precludes a defense to the crime charged insofar as it precludes the defendant from introducing evidence of his innocent intent.

7. Whether Due Process of Law under the 14th Amendment to the United States Constitution requires that a State demonstrate, beyond a reasonable doubt, the coalescence of

(a) an act and

(b) a wrongful criminal intent, i.e., a **mens rea** (the criminal intent used by this Honorable Court in **Morissette v. United States** 342 U.S. 246) in a State criminal prosecution in any serious felony where the sanction is a potential state prison sentence and the additional sanction is always an automatic disqualification to ever again hold public office in the State of

California?

8. Whether a California state prosecution under Penal Code 424.2 for misuse of public funds (a larceny related offense) which here occurred by the petitioner, an Orange County Supervisor, personally using a county-paid staff in a campaign for reelection can be achieved if and only if it can be demonstrated by the State that the petitioner possessed a **mens rea**, or specific criminal intent to deprive Orange County of money, within the meaning of the due process clause of the 14th Amendment and within the reasoning of this Honorable Court in **Morissette v. United States**, 342 U. S. 246?

9. Whether California Penal Code 424 subsection 2, as written and as applied, unconstitutionally, shifts the burden of proof of the key element of the crime to the state criminal defendant, in violation of the mandates of **Mullaney v. Wilbur**, 421 U.S. 684 inasmuch as the state can never truly demonstrate a negative . . . it can not demonstrate something not provided for by law . . . and the criminal defendant prosecuted for peripheral use of his staff in a reelection campaign under California Penal Code 424.2 must attempt to demonstrate that his act was permitted by the tradition and unwritten law of the history of campaigns for reelection of legislators in the United States?

10. Whether a state criminal defendant is denied due process of law by being the first and only elected

legislator in the entire history of the United States to be selected for felony prosecution for peripheral use of his staff in a reelection campaign by a local district attorney, who, at the time of the indictment, is also personally suing the defendant county legislator in a civil law suit and where, during the trial, two additional civil law suits are filed with the District Attorney and this county supervisor, Petitioner Robert W. Battin, as antagonists? (See, e.g., Cecil Hicks, District Attorney, v. Board of Supervisors, 69 Cal. App. 3rd 228).

11. Whether the reasoning of the California Supreme Court in **People v. Superior Court [Greer]** 19 Cal 3rd 255 is of Federal Constitutional Dimension requiring Grant of Certiorari and Reversal of this conviction?

12. Whether the discriminatory selection of a given individual for criminal prosecution under a statute that fails to overtly set forth what is proscribed denies Federal Constitutional Due Process of law, and whether the reasoning of the California Supreme Court in **Murgia v. Municipal Court**, 15 Cal 3rd 286, attains Federal Constitutional Due Process mandate resulting in reversal of the instant conviction?

13. Whether a state criminal defendant who is a county elected supervisor is denied due process of law by being personally prosecuted by a District Attorney who is a political enemy and whose budget is controlled, in part, by that Supervisor?

14. Whether petitioner Orange County Supervisor

Robert W. Battin was denied equal protection of the law by not having the office of Orange County District Attorney Cecil Hicks disqualified from prosecution, inasmuch, on much less grounds, the Orange County Superior Court, the Court of Appeal, and the Supreme Court of California upheld the disqualification of that same office in a similar criminal action against two other fellow Orange County Supervisors, Philip Anthony and Ralph Diedrich, No. C-38160?

15. Whether a state criminal defendant is denied due process of law by being prosecuted by a District Attorney whose deputies and investigators are witnesses against that criminal defendant, within the meaning of the decision of the Supreme Court of California in **Comden v. Superior Court**, 20 Cal 3rd 906, a decision handed down on April 11, 1978 just two days before that same court denied a hearing to petitioner on inter alia, exactly that same issue, on April 13, 1978?

[D.]

[1.] UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED.

Sixth Amendment—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2.] CALIFORNIA PENAL CODE SECTION 72.

72. Presenting false claims. Penalty. "Officer", "Carrier" defined. Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, city, or district board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is punishable either by imprisonment in the county jail for a period of not more than one year, by a fine of not exceeding one thousand dollars ($1,000), or by both such imprisonment and fine, or by imprisonment in the state prison for a period of not more than five years, by a fine of not exceeding ten thousand dollars ($10,000), or by both such imprisonment and fine.

As used in this section "officer" includes a "carrier," as defined in Section 14057 or 14555 of the Welfare and Institutions Code, authorized to act as an agent for a state board or officer or a county, city, or district board or officer, as the case may be.—Amended, Stats. 1969, Chap. 545.

CALIFORNIA PENAL CODE SECTION 424:

Section

424. Public Officers, Embezzlement and falsification of accounts By. Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys who either:—

1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,

2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; or,

3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

4. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

5. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon

such moneys by competent authority; or,

6. Willfully omits to transfer the same, when such transfer is required by law; or,

7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same;—

Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state.

As used in this section; "public moneys" includes the proceeds derived from the sale of bonds, or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency.—Amended Stats. 1965, Chap. 107.

[3.] CALIFORNIA JURY INSTRUCTIONS INVOLVED:
CALJIC 3.30 [1975 Revision]
CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT

In the crime charged in [Count . . . . . of] the information, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

[E.]

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

This Petition for Certiorari presents several issues of first impression and Federal Constitutional Due Process significance.

Petitioner Robert W. Battin was formerly Chairman of the Orange County, California Board of Supervisors, and is a practicing attorney and member of the Bar of the Supreme Court of California.

In January, 1974, during petitioner's second four-year term of the Orange County Board of Supervisors, he sought the California Democratic Party nomination for Lt. Governor of California. Following national, state, and local tradition, petitioner's county paid supervisorial staff aided him peripherally in his campaign for re-election, but such help came only after all official work of the office was completed. (Footnote 36)

Because of his position as an Orange County Supervisor, he was furnished with a supervisorial office staff at County of Orange expense. In general, these county-paid employees were young girls and boys in

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Footnote 36: Indeed, the California Court of Appeal acknowledged in *People v. Battin*, 77 Cal.App.3rd 635, 645, that ". . . However, despite all these efforts by the defendant staff, during regular working hours, it was uncontested at trial that the defendants supervisorial work was accomplished during the February through June period . . ."

their early twenties, many of their either attending college, law school or awaiting results of the California Bar Examination.

As is not unusual in such an environment, young people sought such employment and were employed in such positions for the excellent experience obtained in working in a political surrounding at the county level of government, in order to prepare them for their own eventual entry into public office or for preparation for their own law practice, or for entry into para-governmental positions.

During the some four months immediately preceding the June 4, 1974, primary election, petitioner's county-paid supervisorial staff aided peripherally in his campaign for Lieutenant Governor of California pursuant to national custom and pursuant to overt sanction by official U.S. Government Rules provided for incumbent office holders in the United States House of Representatives and pursuant to well-established local and national custom.

Likewise, this Honorable Court can take judicial notice that the incumbent United States President running for re-election enjoys the help of his staff, benefits not available to his opponent. See pages Appendix C-1, C-2, D, E, of the Opening Brief presented to the Court of Appeal.

In fact, official U.S. House of Representative Publications providing instruction for re-election campaign efforts for incumbent United States

Congressmen overtly embraces, sanctions, and acquiesces in the use of the congressional staff, paid for by the U.S. Government, to aid the Congressman in his campaign efforts. (Footnote 37)

It is, of course, fundamental that State Courts can provide more protection for their citizens than is mandated by the United States Constitution, but they can not provide less. (Footnote 38) Petitioner Battin has been prosecuted and convicted under a section of the

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Footnote 37: The official U.S. Government publication, "Important Statutory and Regulatory Information and Accompanying Forms Relating to the Election of Candidates to the U.S. House of Representatives," governing use of the Government paid staff aides in an election campaign directed to members of the U.S. House of Representatives provides at page 127 and 128:

"As the the allegation regarding *campaign activity* by an individual *on the clerk-hire rolls of the House*, it should be noted that, due to the irregular time frames in which the Congress operates, it is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week — at others, some less. Thus, employees are expected to fulfill the clerical work the member requires during the hours he requires and generally are free at other periods. *If, during the periods he is free, he voluntarily engages in campaign activity, there is no bar to this* . . . ." (emphasis added.).

Footnote 38: For example, in *Cooper v. California* 386 U.S. 58, 62, this Honorable Court said:

"Our holding, of course does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.

California Penal Code 424 which does not overtly proscribe such peripheral use of the supervisorial staff, but which has been interpreted, in this case, of initial national impression to ensnare Petitioner Battin as the

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Footnote 39: California Penal Code 424 provides:

CRIMES AGAINST THE REVENUE AND PROPERTY OF THIS STATE. §424-440. Section 424. *Public Officers. Embezzlement and falsificatoin of accounts By.* Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,

2. Loans the same or any portin thereof; makes any profit out of, or uses the same for any purpose not authorized by law; or,

3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

4. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

5. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

6. Willfully omits to transfer the same, when such transfer is required by law; or,

7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same;

Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state.

As used in this section; "public moneys" includes the proceeds derived from the sale of bonds, or other evidence of indebtedness from the sale of bonds, or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency. —Amended Stats. 1965. Chap. 107.

Petitioner was prosecuted under subsection 2.

first elected legislative official in the history of the United States to be prosecuted as a felon for the peripheral use of his staff aides in his own campaign for re-election.

In fact, well over a year elapsed before petitioner was indicted in mid-1975. The pre-trial and trial record indicated that petitioner was selected as a target by Orange County District Attorney Cecil Hicks, who was a long-time political enemy of Petitioner Battin. At the time that District Attorney Hicks successfully sought Petitioner Battin's indictment by the Orange County Grand Jury, Hicks was the plaintiff in a civil suit against Petitioner Battin as a member of the Orange County Board of Supervisors. **Cecil Hicks v. Board of Supervisors**, 69 Cal. App. 3rd 228 details some of the events leading to this civil suit by District Attorney Hicks against petitioner; this suit was pending in Orange County Superior Court at the time of the indictment, and it was followed by two other suits involving District Attorney Hicks and Supervisor Battin, making a total of three suits, all in progress at

the time Hicks was prosecuting Petitioner Battin. (Footnote 40)

The petitioner was brought to trial before Orange County Superior Judge Kenneth E. Lae, charged with one count of theft (P.C. 484-487), several counts of presentation of fraudulent claims (P.C. 72) and a single count of "misuse of public funds" (P.C. 424(2). The jury hung on the P.C. 484-487 theft count, and that count was dismissed.

All of the foregoing Penal Code sections, allegedly save P.C. 424(2), require that the People demonstrate beyond a reasonable doubt that the petitioner possess a "**mens rea,**" i.e., a **specific criminal intent** to somehow commit a sort of larcenous act against the County of Orange. Importantly, petitioner was acquitted of all counts of violation of P.C. 72 and was convicted of the violation of P.C. 424(2), the "crime of general criminal intent."

Footnote 40:

See *Cecil Hicks, District Attorney, v. Board of Supervisors, County of Orange,* 69 Cal App 3d 228, at 239 and 244. The other two cases are *Orange County Employees Association v. County of Orange,* No. 236402, filed Oct. 20, 1975, and *County of Orange v. Merrill Duncan, Cecil Hicks, et al,* No. 239519, filed Dec. 24, 1975, which also involved District Attorney - Board of Supervisor acrimony, exacerbation and marked Hicks-Battin personal confrontation. Thus, while appellant was under indictment, but before trial, he was made a defendant in yet another *civil* lawsuit instigated by the Orange County District Attorney's office. That suit was entitled *Orange County Employees Association v. County of Orange,* No. 236,402, filed October 20, 1975, in the Orange County Superior Court. This sort of Hicks-Board controversy resulted in recusal of Mr. Hicks in *People v. Supervisors Diedrich and Anthony,* Orange County Superior Court No. C-38160.

It was the ruling of the trial court, and the concurrence of the State Court of Appeal, that California P.C. 424(2), a serious felony resulting in a 1-10 year state prison sentence and a loss of a chance to ever again hold or run for public office in California, requires that the People demonstrate but a "general criminal intent," i.e., that the petitioner acted in the use of the supervisorial staff without any "mens rea," without any intent to embezzle, defraud or take public funds from the County of Orange.

On May 24, 1976, appellant was convicted on a single count for violation of Penal Code 424(2), a crime of asserted "general intent."

In short, petitioner was convicted of a very serious consequential felony resulting in confinement, a $3,500 fine and loss of his **First Amendment right** to ever again seek public office, **without ever possessing one iota of wrongful intent!**

The foregoing United States constitutional anomaly and infirmity constitutes one of the foundations of this Petition for Hearing, and supports the following significant issues of state-wide, if not national, consequences which should support the grant of this Petition for Hearing.

Further, the evidence at trial was uncontested that an intense personal hatred existed toward petitioner Battin from Orange County District Attorney Hicks. Because of this, petitioner became the first elected legislator in the nation to be charged with the new

crime of using his office staff to aid his own re-election campaign efforts. This occurred at a time that District Attorney Hicks was personally embroiled with petitioner Robert Battin in at least three separate and distinct civil law suits, one of them culminating in a decision by the same California Court of Appeal, 4th Appellate District, Division 2, where Justices Kaufman, McDaniel and Morris specifically recognized appellant Supervisor Battin's role in attempting to transfer the 22 investigators from District Attorney Hicks' staff to the staff of Orange County Sheriff Brad Gates.

Hence, the discriminatory prosecution of petitioner Battin by District Attorney Hicks and the marked conflict of interest disqualifying Mr. Hicks' office from the case cannot now be seriously questioned. **People v. Superior Court [Hartway]**, 19 Cal 3d 338; **Murgia v. Municipal Court**, 15 Cal 3d 286.

During pre-trial motions and during trial, many Deputy District Attorneys and investigators of the office of Orange County District Attorney Hicks were called as witness against petitioner; hence not only did Orange County District Attorney Hicks prosecute Petitioner Battin in an alleged crime of first-time national impression, but while that trial was occurring, District Attorney Hicks was personally engaged in three civil law suits against Petitioner Battin, and District Attorney Hicks used his deputies and his investigators as key material witnesses in the pre-trial

motions and during the trial, all of which has been held unconstitutional by the California Supreme Court. **People v. Superior Court [Greer]**, 19 Cal3rd 255; **Comden v. Superior Court**, 20 Cal3rd 906.

The California Court of Appeals refused to accord such protection to Petitioner, although anomalously according the very same protection to two other Orange County Supervisors, Ralph Diedrich and Philip Anthony. (Footnote 41

California prosecuted Petitioner under a statute that allegedly precludes a criminal defendant from introducing evidence to negate his "general criminal intent; (Footnote 42) unless he can demonstrate that he

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Footnote 41: It is important to realize, as we elaborate upon later in this petition that District Attorney Hicks' office was formally disqualified from prosecuting, in late 1977, Orange County Supervisors Ralph Diedrich and Philip Anthony *on much less grounds* than those existing between Hicks and petitioner Battin; both the Fourth Appellate District Court of Appeal and the California Supreme Court declined a hearing sought by District Attorney Hicks in the review of Orange County Superior Judge Philip Schwab's ruling. See Orange County Superior Court No. C-38160. The trial judge recused the Orange County District Attorney's office on the basis that there was an apparent conflict of interest for a plaintiff to go after a defendant who controlled plaintiff's budget. That decision was appealed by District Attorney Cecil Hicks to the California Supreme Court. That Court denied a hearing on or about January 12, 1978. Severe United States constitutional equal protection issues are raised by the Diedrich recusal but denial of the Battin recusal.

Footnote 42: See, e.g. *People v. Tewksbury*, 15 Cal 3d 953 (burden on proponent of accomplice to establish that a given witness is an accomplice).

did not even do the act with which he was charged, he is guilty; he can not introduce evidence of his "Innocent intent."

As developed in this Petition for Certiorari, Petitioner asserts and contends that California Penal Code 424(2) is unconstitutional in that it:

(a) shifts the burden of proof of an element of the statutory crime from the People to the criminal defendant in violation of **Mullaney v. Wilbur** (1974), 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881;

(b) creates a special and distinct class of alleged criminal defendants out of the elected public officials such as a county supervisor and denies them equal protection of the law in requiring them to carry the burden of attempting to demonstrate that their activity comes within "a purpose authorized by law," whereas the usual penal statute specifically and overtly sets forth what conduct is proscribed instead of requiring the defendant to demonstrate what is allowed;

(c) is unconstitutionally void for vagueness;

(d) is unconstitutionally overly broad in encompassing, for the first time, elected legislator's own staff in his own reelection campaign as criminal behavior without demonstration of a "mens rea" or "guilty knowledge" or "specific criminal intent";

(e) is an ex post facto law created, in its

application to the facts at bar, by the office of the Orange County District Attorney, Cecil Hicks, and the Superior Court of Orange County.

[F.]

REASONS FOR GRANTING OF PETITION FOR CERTIORARI

1. To resolve the constitutionality of California P.C. 424.2 insofar as it shifts the burden of proof of the very element that the statute deals with to the criminal defendant, requiring that criminal defendant to show that his act allegedly involving ". . . public monies . . ." was a use ". . . for a purpose authorized by law. . .", in order to defend the charges brought under California P.C. 424.2, contrary to the mandates of the U.S. Supreme Court in **Mullaney v. Wilbur**, 421 U.S. 684, 701, 44 L.Ed. 2d 508, 520, 95 S. Ct. 1881, which provides:

". . . In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous . . . conviction . . ."

2. To resolve the constitutionality and to resolve the due process consequences of classifying California P.C. 424.2 as a statute of "general criminal intent" where the statute clearly is aimed at countering a theft or larceny or embezzlement from a governmental body

by an "officer of . . . any county . . . charged with the . . . . . disbursement of public monies . . . ," where:

(a) the consequences of conviction mandate a sentence to the state prison for 1-10 years, a monetary fine, and disqualification from holding any office in the State of California for the remainder of his life; and

(b) the criminal law has always traditionally required a coalescence of an act with a "mens rea," or criminal, culpable intent to commit theft; and

(c) the United States Supreme Court in **Morissette v. United States**, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240 has required, at least for the federal court system, that a federal criminal defendant cannot be convicted of a crime of larceny unless the government demonstrates beyond a reasonable doubt that the federal criminal defendant acted with the "**specific criminal intent**" to deprive the government of the property in question.

3. To resolve the constitutionality of using California P.C. 424.2 to prosecute, for the first time in California, a publicly elected legislator who makes peripheral use of his county-paid staff to aid him in his own reelection campaign, where it is contended that said statute, as used, is:

(a) constitutionally void for vagueness;

(b) constitutionally overly broad in its application;

(c) an **ex post facto law** created by the office of the

Orange County District Attorney and the Superior Court of Orange County;

(d) a denial of equal protection to the county officer insofar as it requires him to have no notice of overtly proscribed conduct unlike all other traditionally worded Penal Code statutes which govern all other citizens of California;

. . . and where it is contended that all federal regulations at the level of the United States presidential and United States Senate-Congressional elections and on downward allow the incumbent office holder to make use of his governmental paid staff by overt provisions in official government publications; . . . and where it is contended that **tradition** has always assumed that said incumbent office holder can utilize his staff, as one of the accouterments of his office, in his own reelection campaign.

4. To resolve the constitutionality of the District Attorney of Orange County personally prosecuting petitioner Robert W. Battin, a member of the Orange County Baord of Supervisors where:

(a) at the time that said criminal prosecution was initiated by Grand Jury indictment, the said Orange County District Attorney Cecil Hicks was **personally the plaintiff** in a civil lawsuit against the Orange County Board of Supervisors, petitioner being one of the five persons constituting said Board, a case culminating in **Hicks v. Board of Supervisors**, 69 Cal App 3d 228, a decision by the

exact same panel of Justices of the Fourth Appellate District, Court of Appeal (Justices Kaufman, Morris and McDaniel) which affirmed petitioner's conviction of a violation of one count of P.C. 424.2, and where at the same time the said Cecil Hicks was also engaged in two (2) other civil lawsuits involving the Orange County Board of Supervisors within the meaning of **People v. Superior Court [Greer]**, 19 Cal 3d 255; and

(b) a severe, acrimonious, exacerbated personal publicly-aired contempt existed from the District Attorney, Cecil Hicks, toward petitioner, Supervisor Robert W. Battin; and

(c) the Orange County Superior Court in late 1977 disqualified the Orange County District Attorney, Cecil Hicks, from prosecuting two other members of the Orange County Board of Supervisors, Ralph Diedrich and Philip Anthony, on much less grounds than set forth above, and said ruling was upheld by both the Fourth District California Court of Appeal and the Supreme Court of California in January, 1978.

5. To resolve the constitutionality of Orange County District Attorney Cecil Hicks selecting Orange County Supervisor, petitioner Robert W. Battin, discriminatorily as the first publicly elected legislator to be prosecuted for peripheral use of his county-paid staff to aid him in his own campaign for election to public office, where the evidence was undisputed that:

(a) All county work in the First Supervisorial office was always done prior to any peripheral work on the election campaign;

(b) Hicks was then engaged personally in three civil lawsuits with the Orange County Board of Supervisors;

(c) Hicks had a personal dislike, antipathy and antagonism toward petitioner stemming from petitioner's perceived efforts on the Board of Supervisors to undermine the working machinery of District Attorney Hicks' office by, inter alia, transferring 22 investigators from the District Attorney to Sheriff Brad Gates.

6. To resolve the constitutionality of petitioner being deprived of a demanded post-indictment preliminary hearing where he could have the constitutional assistance of counsel, confront and cross-examine his accusers, call and examine with counsel witness in his own defense, and where instead a Grand Jury indictment was used, where the office of District Attorney Hicks wilfully refused to call a multitude of exculpatory witnesses favorable to petitioner and in fact, wilfully suppressed said evidence, an issue currently before the California Supreme Court in **Hawkins v. Superior Court**, 77-145 S.F. 23682 (1 Civ. 42037), and **Sherwood v. Superior Court**, L.A. 30850 (4 Civ. 19150).

7. To resolve whether the District Attorney of any county can prosecute a criminal defendant where the

District Attorney in person, or by agents, deputies and investigators of that office are simultaneously called as witnesses in that prosecution. A related issue has been decided by the California Supreme Court in **Comden v. Superior Court**, 20 Cal 3rd 9, L.A. 30787 (2 Civ. 50531; 69 C.A. 3d 453).

8. To resolve the immunity, if any, of a publicly elected official (legislator, attorney general, or governor) who separates staff members from the public payroll, paying them with private funds for campaign work, because subjectively they were hired for both public work and campaign work. Even if all public work is completed, if free time is used for campaign work, is there a felony misuse of public moneys?

9. To resolve whether negligent supervision of a publicly elected official's staff makes the elected public official guilty of a felony;

10. To resolve whether the constitutional "due process" and "equal protection" standards of legal conduct applicable to a publicly elected legislator on the county or state level shall be less stringent than for a federal (U.S. Congressman) legislator, in the absence of a statute or published appellate court opinion making those standards less stringent than the federal standards. Alternatively, do federal standards apply to California (U.S.) Congressmen, state legislators and county legislators?

11. To resolve whether constitutional due process of law requires that a state allow a criminal defendant

to show that his alleged criminal act was accompanied by an "innocent intent" within the meaning of **Morissette v. United States**, 342 U.S. 246 and **People v. Osborne**, 77 Cal. App 3rd 472.

[G.]
ARGUMENT IN SUPPORT OF GRANTING OF CERTIORARI
I

CALIFORNIA PENAL CODE 424(2) IS UNCONSTITUTIONAL WITHIN THE MEANING OF **MULLANEY v. WILBUR**, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, IN THAT IT SHIFTS THE BURDEN TO A CRIMINAL DEFENDANT TO SHOW THAT HIS ACT INVOLVING ALLEGED (MIS)USE OF PUBLIC MONEYS " . . . WAS A USE . . ." " . . . FOR A PURPOSE AUTHORIZED BY LAW . . . ," WHEREAS THE CRIMINAL DEFENDANT SHOULD BEAR NO BURDEN IN PROVING ANY ELEMENT OF THE PEOPLE'S CASE WHATSOEVER.

It is fundamental in logic of the law and the law of logic that one cannot establish a "negative." To prosecute one successfully under an allegation of violation of P.C. 424(2), the People of necessity would want to establish that there is no act or purpose authorized by law which allows or permits the behavior engaged in by the alleged wrongdoer; but this is exactly the attempt to establish a "negative," and law and logic places the burden on he who seeks to establish the

positive. (Footnote 42)

Clearly, the law and logic (as in the case at bar) purports to shift to the criminal defendant the establishment that some structure exists which makes lawful his behavior. In doing so, the law has shifted the burden of proof of the key element of the crime to the criminal defendant supervisor, which contravenes the mandates of **Mullaney v. Wilbur**, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S. Ct. 1881. It is evident that petitioner sought to show that an opinion of Orange County Counsel Kuyper supported the peripheral use of the staff to perform some campaign activity after all county work was done, because the staff had no minimum number of hours that they had to work to get their full pay, (Footnote 43) alternately, petitioner was forced to argue, as he does here, that federal provisions for the Senate and House allow such use of the government

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Footnote 43: Orange County Counsel Kuyper's opinion of August 28, 1975, provided: "You have asked whether or not there is any minimum number of hours a staff member of your office must work in order to be entitled to compensation. I believe the answer is no."

. . . .

See Appendix "G" of petitioner's Opening Brief. See also page 10-11, Slip Opinion, Appendix "A".

paid staff in an election campaign. (Footnote 44) Similarly, all tradition from the United States presidential election campaign on downward provides such paid-staff help for the incumbent.

It is clear that petitioner had the burden shifted to him to attempt to establish the legality of his use of the county-paid staff rather than the burden of demonstrating illegality remaining on the People. Normally, all criminal statutes keep the burden of proof of violation on the People where it rightfully belongs, but P.C. 424(2) unconstitutionally violates this major premise.

That such is constitutionally unsound is shown by **Mullaney v. Wilbur**, which provides at 44 L. Ed. 2d 508, 519:

> **The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant**

Footnote 44: "Important Statutory and Regulatory Information and Accompanying Forms Relating to the Election of Candidates to the U.S. House of Representatives" provides at pages 127-128: "As to the allegation regarding campaign activity by an individual on the clerk-hire rolls of the House, it should be noted that, due to the irregular time frames in which the Congress operates, it is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week—at others, some less.

Footnote 42: *Ibid.*

member requires during the hours he requires and generally are free at other periods. *If, during the periods he is free, he voluntarily engages in campaign activitiy, there is no bar to this.* . . (emphasis added).

(See Appendix "F" of petitioner's Opening Brief.)

impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case.

Maine divides the single generic offense of felonious homicide into three distinct categories — murder, voluntary manslaughter and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct. See State v. Lafferty, 309 A 2d, at 670-672 (concurring opinion). But under Maine law these facts of intent are not general elements of the crime of felonious homicide. See Brief for Petitioners 10 n 5. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide — even those that traditionally might be considered involuntary manslaughter — unless the defendant

was able to prove that his act was neither intentional nor criminally reckless.

Further, the High Court said at 44 L. Ed. 2d 508, 520:

In Winship the Court emphasized the societal interests in the reliability of jury verdicts:

"The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .

"Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Id., at 363, 364, 25 L Ed 2d 368, 90 S Ct 1068.

These interests are implicated to a greater degree in this case than they were in Winship itself. Petitioner there faced an 18-month sentence, with a maximum possible extension of an additional four and one-half years, 397 U S, at 36, 25 L Ed 2d 368, 90 S Ct 1068, whereas respondent here faces a differential in sentencing ranging from a nominal fine to a mandatory life sentence. Both the stigma to the defendant and the community's confidence in the administration of the criminal law are also of greater consequence in this case, since the adjudication of delinquency involved in Winship was "benevolent" in intention, seeking to provide "a generously conceived program of compassionate treatment." Id., at 376, 25 L Ed 2d 368, 90 S Ct

1068 (Burger, C.J., dissenting).

The key holding of Mullaney v. Wilbur re the burden shift is:

> Not only are the interests underlying Winship implicated to a greater degree in this case, but in one respect the protection afforded those interests is less here. In Winship the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. Such a result directly contravenes the principle articulated in Speiser v. Randall, 357 U S 513, 525-526, 2 L Ed 2d 1460, 78 S Ct 1332 (1958):
>
> "(W)here one party has at stake an interest of transcending value — as a criminal defendant his liberty — th[e] margin of error is reduced as to him by the process of placing on the (prosecution) the burden . . . of persuading the fact-finder at the conclusion of the trial . . . "

See also In re Winship, 397 U S at 370-372, 25 L Ed 2d 368, 90 S Ct 1068 (Harlan, J., concurring).

The Court of Appeal at page 117 of the slip opinion, recognizes the radical shift of burden difference created by P.C. 424(2):

> ". . . Section 424(2), . . . , works in reverse of most penal statutes that apply to ordinary citizens. Rather than prohibiting specifically enumerated behavior, it prohibits any behavior which has not been previously approved by statute or ordinance . . ."

P.C. 424(2) requires the defendant to show the legality of his act, for the state cannot truly demonstrate a negative. This is error of federal constitutional dimension.

It is apparent, therefore, that P.C. 424(2) unconstitutionally shifts the burden of proof of the key element of the statute to the criminal defendant charged by that statute. It must therefore be stricken and petitioner's conviction reversed.

Certiorari should be accorded to look into this patently unconstitutional statute, clearly in violation of the mandates of Mullaney v. Wilbur, 421 U.S. 684.

II

CALIFORNIA PENAL CODE 424(2) REMAINS AN UNCONSTITUTIONAL VESTIGE OF AN ARCHAIC HALF CENTRY AGO, IN THAT IT PURPORTS TO SUPPORT THE CONVICTION OF A CRIMINAL DEFENDANT FOR A LARCENY-EMBEZZLEMENT TYPE OFFENSE BY DEMONSTRATING A SO-CALLED "GENERAL CRIMINAL INTENT"; THE REASONING OF THE CALIFORNIA SUPREME COURT IN 1926 IN PEOPLE v. DILLON, 199 CAL 1, MUST BE RE-EXAMINED ALONGSIDE THE MANDATES OF MORISSETTE v. UNITED STATES, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240, AND THE "BEYOND REASONABLE DOUBT" DUE PROCESS

MANDATES OF IN RE WINSHIP, 397 U.S. 358, 364. A HEARING SHOULD BE ACCORDED.

Petitioner Battin was convicted of a serious felony providing for a 1-10 year state prison sentence and disqualification from ever holding office again in the State of California, under a statute that purportedly does not require the State of California to demonstrate that petitioner possessed a **mens rea** or wrongful intent, where the crime involved is an embezzlement of money from Orange County, contrary to the modern reasoning of **Morissette v. United States**, 342 U.S. 246, 96 L. Ed 288, 72 S. Ct. 240; this Honorable Court must and should re-examine the antiquated reasoning of **People v. Dillon**, 199 Cal. 1 (1926), a decision in excess of 50 years ago, and one totally out of step with generally well recognized principles of criminal and constitutional law requiring coalescense of act and **wrongful** intent; **see In re Winship**, 397 U.S. 358, 364. It is an issue of due process of law under the Fourteenth Amendment.

It is, of course, elementary Hornbook law that in order to constitute a crime there must be a coincidence of a volitional act and **wrongful** criminal intent. The exceptions are few and far between and are relegated to that sort of behavior which usually results in **short** custodial sanctions or monetary fines. The examples are well known, e.g., the typical traffic violation, where a so-called "general criminal intent" is all that is required. This merely means that the perpetrator acted

volitionally without the specific or wrongful intent to violate the law, i.e., without **mens rea**, or evil or wrongful intent. Some jurisdictions have labelled this sort of "crime" as one of "strict liability," although such labels are more properly attached to persons who themselves do not volitionally or knowingly act and usually are unaware of the act. Examples are prosecutions for adulterated foods, or short weights in food product, etc. Again, the sanction is usually a monetary fine, without community opprobrium.

Surely a crime having any connection to larceny or theft is difficult to reconcile in any other category save the demonstration of **specific criminal intent**, 'i.e., a "mens rea" or "guilty knowledge," or "evil or wrongful intent." The reasoning of the United States Supreme Court in **Morissette v. United States**, 342 U.S. 246, 96 L. Ed 288, 72 S. Ct 240, is surely illustrative of the problem in the case at bar.

Stripped of its veneer and facade, in reality the County of Orange prosecuted Orange County Supervisor Battin for a sort of **theft** or **larceny** or **embezzlement** of public monies from the County of Orange, exemplified by the petitioner using his county-paid supervisorial staff to aid him in his personal campaign for the 1974 Democratic nomination for Lieutenant Governor of California.

Significantly, concomitant prosecution under several other charged counts of P.C. 72, a crime of **specific criminal intent** on the same set of facts,

resulted in acquittals, demonstrating petitioner's lack of mens rea or wrongful intent on the facts in question. The Court of Appeal recognizes this anomalous dichotomy; see pages 133-136, Opinion, Appendix A.

It appears that an old case decided by The California Supreme Court in 1926, **People v. Dillon**, 199 Cal. 1, sanctioned a conviction under P.C. 424 without demonstration of a mens rea, or wrongful specific criminal intent. However, the strides made in interpretation of criminal and constitutional law since the advent of the Warren court suggests that Dillon, supra, is out of step with reality in the criminal law process. **Morissette v. United States**, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240. Dillon, clearly, should be re-examined against the reasoning of Morissette, and the instant case presents the appropriate vehicle.

We have shown in the Exhibits to our Opening Brief on Appeal that the recognized "authority" in the United States has traditionally allowed the elected incumbent politician to make peripheral use of his staff in his quest for reelection. Consequently, and as demonstrated by the jury acquittals of several counts of violation of Penal Code Section 72, petitioner Battin possessed no criminal intent, i.e., no mens rea, wrongful or evil plan to bilk the County of Orange out of any money. He merely utilized the traditional accouterments of his office. Without attempting intellectualization on the morality of such practice, the elementary fact is that it has heretofore never been

branded as criminal for an elected California office holder to use his office staff to aid him peripherally in his quest for higher office. The sanction is clearly severe — 1 - 10 years in prison and disqualification from ever holding office in California again. Such a sanction is hardly in keeping with a conviction of a "crime" without a simultaneous demonstration of a mens rea or wrongful intent.

The accompanying community opprobrium requires that such significant consequences be accompanied by proof of wrongful intent.

It would appear that the subsequently-decided California case of **People v. Sperl**, 54 Cal App 3d 640 (:1976) presented no warning to petitioner's February - June 1974 political campaign efforts and should serve as no authority suggesting wrongfulness by an allegedly analogous set of facts.

Morissette v. United States presents very persuasive reasoning for the general due process requirement that an American citizen should never suffer the stigma of being convicted of a serious crime absent the demonstration, beyond a reasonable doubt, that his volitional act was accompanied by mens rea or wrongful intent. Morissette, itself a case of theft/larceny, provides, inter alia, that:

1. In a case of theft or larceny, the criminal defendant must be able to argue that he possessed no wrongful intent and the jury must be instructed

accordingly. (Footnote 45)

Footnote 45: This Court noted at 342 U.S. 246, 248, that defendant/respondent Morissette had urged that his absence of *wrongful intent* was a defense:

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were castoff and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: "He took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court stated: "I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property." The court refused to submit or allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: "And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned, because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty." Petitioner's counsel contended, "But the taking must have been with a felonious intent." The court ruled, however: "That is presumed by his own act."

The Court of Appeals suggested that "greater restraint in expression should have been exercised," but affirmed the conviction because, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions." Its construction of the statute is that it creates several separate and distinct offenses, one one being knowing conversion of government property. The court

Footnote 45 continued on page 47

2. The mere fact that wrongful intent is not overtly mentioned as an ingredient of a penal statute does not serve to infer that such a wrongful intent demonstration is not required: at 342 U.S. 248, 250, this Court said:

> In those cases, this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more — it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.
>
> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability

Footnote 45 continued...

ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in United States v. Behrman, 258 U S 280, 66 L Ed 619, 42 S Ct 303, and United States v. Balint, 258 U S 250, 66 L Ed 604, 42 S Ct 301.

We note that the High Court uses *criminal intent* synonymously with California's *specific intent;* thus, Morissette does not recognize "general criminal intent" as being a wrongful criminal intent; it appears that the California Court of Appeal and not defense counsel is confused in the interpretation of *Morissette;* see page 28, 29, fn. 19; *Morissette* does declare that *wrongful,* not "general" intent must be a part of any larceny conviction.

and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.

Crime, as a compound concept generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of

various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

This U.S. Supreme Court analysis is clearly at odds with the Court of Appeal Slip Opinion at pages 133-136.

3. Only such regulatory statutes as those that impose relatively small penalties and those where the conviction does no "grave damage" to an offender's reputation should support a criminal conviction without demonstrating a wrongful criminal intent. At 342 U.S. 246, 254, 257, we find:

> Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.
>
> Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's

reputation. Under such considerations, courts have turned to construing statutes and regulations wich make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.

4. Stealing, larceny and their variants must support a specific wrongful intent or **mens rea** in order to convict; (and, we might add, under **In re Winship**, 397 U.S. 358, 364, in order to pass federal constitutional due process standards). This Honorable Court said at 342 U.S. 246, 260:

> Stealing, larceny and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, said Maitland, is ". . . as bad a word as you can give to a man or thing." State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research.

5. The state should not strip a criminal defendant of his defense that he did not act with wrongful intent; at 342 U.S. 246, 263:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a **guilty intent**

> is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law **from innocence of evil purpose**, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.
>
> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.
>
> We hold that here omission from Section 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

We note, again, that this Honorable Court's use of **intent means a criminal, wrongful intent**, and not the **"general criminal intent"** of California parlance, i.e., the mere volitional acting without one iota of wrongful mental state.

6. The isolated act of using the supervisorial staff without a **criminal intent** should not support a criminal conviction providing for severe sanctions of 1 - 10 years

in state prison, together with loss of the chance to ever again hold public office. At 342 U.S. 246, 273, this Honorable Court said:

> As we read the record, this case was tried on the theory that even if criminal intent were essential, its presence (a) should be decided by the court (b) as a presumption of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.
>
> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in People v. Flack, 125 NY 324, 334, 26 NE 267, 11 LRA 807:
>
> "It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. . . ."

> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingedient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. Tot v. United States, 319 US 463, 87 L Ed 1519, 63 S Ct 1241.
>
> Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, "Did he intend to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, **wrongfully** to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together

with defendant's testimony and all of the surrounding circumstances.

It is of interest to note that the California Supreme Court in **Stanson v. Mott**, 17 Cal 3d 206, 223, had made it clear that civil liability for the improper expenditure of public funds for campaign purposes shall be determined under the criteria of whether there was or was not a good faith belief on the part of the defendant. **Mines v. Del Valle**, 201 Cal 273, 288-289, was specifically reversed insofar as it made the defendant strictly liable for such losses.

That Court said at 17 Cal 3d 206, 224:

"... We believe that the decision's imposition of strict liability on public officials who, in good faith, mistakenly authorize improper expenditures, is incompatible with subsequent legislative developments in related areas. ..." (Footnote 46)

That Court noted in **Johnson v. State of California** (1963), 69 Cal 2d 782, 792 (73 Cal Rptr 240, 447 P 2d 352), that personal liability of a government employee under the California Tort Claims Act

"... attaches only in the rare instances of injuries arising from acts either outside the scope of employment or performed with actual fraud, corruption, or malice...."

Under Government Code 822, a public official is personally and civilly liable only "... if the loss was

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Footnote 46: Note bene, of course, that *Morissette v. United States*, 342 U.S. 246, a much later case than *People v. Dillon*, 199 Cal 1 (1926), made Dillon incompatible with prosecution under general criminal intent concepts.

sustained as a result of his own negligent or wrongful act or omission. ..."

In **Stanson v. Mott**, 17 Cal 3d 206, 226, the California Supreme Court said that public officials must use "due care," i.e., "reasonable diligence" in authorizing the expenditure of public funds, or suffer potential civil consequences.

We take this to mean that the state must overtly show that they were more errant than the mere doing of the act under a belief that their behavior was sanctioned by custom.

As we note elsewhere, petitioner travelled under the well-established national custom that allowed already-elected legislators to make at least peripheral use of their own staff to aid them in seeking reelection in their own reelection campaign.

Can it be realistic that one should be prosecuted criminally where there is an unlikely success of even establishing civil liability?

This rhetorical question suggests the constitutional anomaly presented by petitioner's case.

Petitioner believed, and so acted, that he could make peripheral use of the staff (where all official work had initially been done each day) on his campaign for reelection.

As we read **Stanson v. Mott**, 17 Cal 3d 206, 223, 224, 226, 227, even civil liability would not attach against petitioner absent any fraudulence, corruption or malice in his acts.

How, then, can the much more consequential criminal sanction be allowed to descend upon him, subjecting him to a potential 1 - 10 year state prison sentence with attending loss of the opportunity to ever again hold public office in California?

We suggest that it cannot, and this case presents the clear-cut avenue to require the grant of a hearing to resolve this fundamental, serious Federal Constitutional issue. (Footnote 47)

Again, we must note that the use of the isolated word "intent" by the High Court in **Morissette** means a "wrongful or ciminal intent," not merely volitional act unaccompanied by **mens rea.**

This case presents a severe, significant test which must result in the Grant of Certiorari. We have, in the case at bar, a California lawyer, a graduate of the University of California, Boalt Hall School of Law, and a duly elected member for nearly eight years of the Orange County Board of Supervisors, honorably functioning in his daily tasks, being convicted of crime although always seeing that all official supervisorial work has been done (as is acknoweldged by the Court of Appeal, slip opinion page 100) **prior to use of a staff to** aid in a peripheral manner in an election campaign; we

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Footnote 47: Note bene, footnote 11 at Cal 3d 206, 226, setting forth a multitude of states holding that public officials incur no *personal liability* so long as they "act in good faith, believing ...that they have authority...to expend the money for the purpose for which they issue warrants . . ." (Arkansas, Louisiana, Minnesota, North Carolina, Oklahoma).

then have that California citizen prosecuted for and convicted of a serious crime involving a potential 1 - 10 year state prison sentence and disqualification from ever running for or holding office again in California, **without a demonstration of a wrongful intent, and indeed, the absence of wrongful intent was conclusively demonstrated by the acquittals of many counts of P.C. 72 violations which require the proof of mens rea, or wrongful intent. (See slip opinion, pages 133-136, inclusive).**

Morissette v. United States, supra, unlike the elderly opinion of 1926 in **People v. Dillon,** 199 Cal 1, points out this manifest intellectual incongruity and suggests that this Honorable Court should grant a hearing to question and nullify the continued viability of a conviction of a serious crime of the nature of larceny in California absent the proof, beyond a reasonable doubt (**In re Winship,** 397 U.S. 358, 364), of a wrongful, evil intent, or **mens rea.** Such a coalescence of **mens rea** and **act** appears to rise to federal constitutional dimension when one couples **Morissette v. United States,** 342 &.S. 246, with **In re Winship,** 397 U.S. 358, 364.

Indeed, a University of California Boalt Hall Law Review article expressed grave concern over the continued viability of the criminal intentless and serious crime in California, where the sanctions were severe and the personal repercussions to the defendant of magnitudinal consequences. See **Criminal Law:**

Bigamy: Intent Required in Bigamy and Other Offenses, 45 Cal. Law Review, 70. At page 73, fn. 30, the article recognizes **Morissette's** authority, and at fn. 30, page 74, the article recognizes the harsh consequences and incongruities of a P.C. 424(2) conviction. (Footnote 48)

The California Law Review article, at page 74, persuasively and intellectually-honestly argues that:

> "... On the other hand, no such persuasive policy consideration demands the exclusion of **mens rea** funds when the defendant has violated the letter of the law but is not "criminally" at fault ..."

We again must call to this Court's attention (1) that petitioner Battin is not "criminally" at fault because he was acquitted of some five counts of P.C. 72 covering the same set of facts where that statute required the People to demonstrate a **mens rea** or wrongful or specific criminal intent (See Opinion, pages 123-128, on the subject of **Inconsistent Verdicts**]; and (2) that the trial record indicated and the Court of Appel has so found at page 100 of the Opinion. Appendix "A," that all of the official, usual required daily work of petitioner's First Supervisorial office was always done throughout February-June, 1974, and that the working of the staff on petitioner's 1974 quest for the

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Footnote 48: ". . . The morally innocent may find that the following are the consequences of a violation of this offense: (1) Imprisonment in the state prison for not less than one nor more than ten years, and disqualification from holding office in this state. Cal. Pen Code Section 424(2)."

Democratic nomination for Lieutenant Governor of California was over, above, and beyond their official county work. Slip Opinion, page 6; Opening Brief, testimony of all witness from the staff.

Thus, this case presents the overly-ripe issue of federal and state constitutional nature whether the due process clause is violated within the meaning of **In re Winship**, 397 U.S. 358, 364, to predicate a state criminal conviction of a larceny-related act without the demonstration, beyond a reasonable doubt, of a **wrongful criminal intent** accompanying the act.

Such an issue is both so profound and so important that the half-century old reasoning of the court in **People v. Dillon**, 199 Cal 1 (1926), must be re-examined per the entire reasoning of **Morissette v. United States**, 342 U.S. 246, and modern authority and reasoning.

A hearing should be accorded to petitioner Battin, a citizen convicted of a serious crime without wrongful intent, and thus denied Federal Due Process of Law.

III

THE CALIFORNIA TRIAL COURT WAS REQUIRED, AS A MATTER OF FEDERAL CONSTITUTIONAL DUE PROCESS OF LAW, TO INSTRUCT THAT IF PETITIONER ACTS WERE ACCOMPANIED BY AN INNOCENT INTENT, SUCH INNOCENT INTENT, IF BELIEVED, WOULD CONSTITUTE A COMPLETE DEFENSE TO THE CRIME REQUIRING THE STATE TO DEMONSTRATE SOLELY SO-

CALLED "GENERAL CRIMINAL INTENT". BECAUSE OF THE FAILURE TO INSTRUCT, SUA SPONTE, ON THE PART OF THE TRIAL COURT, OR BECAUSE OF FAILURE OF COUNSEL TO REQUEST SAID INSTRUCTION, THE PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS CONVICTION MUST BE REVERSED.

Petitioner's conviction was affirmed on January 18, 1978. Twenty-one days later, on February 8, 1978, a different District of the California Court of Appeals held that innocent intent is a defense which, if proven, constitutes a defense to a California crime requiring proof of so-called "General Criminal Intent", and that said instruction of innocent intent being a defense must be given sua sponte by the Trial Court if the defense developed any evidence to support it. **People v. Osborne**, 77 Cal. App. 3rd 472, 475, 477. **People v. Sedeno** (1974) 10 Cal 3rd 703, 716, 112 Cal. Rptr. 1, 518 P.2d 913. **Osborne, supra,** was a case of first impression in California; See 77 Cal. App. 3rd 472, 480.

Petitioner's defense was replete with his belief that tradition permitted him to make peripheral use of his county-paid supervisorial staff in his campaign for election to higher office. Petitioner proved conclusively that when a May 8, 1974 Los Angeles Times article suggested impropriety in such use of an office staff, petitioner and his office manager, Theodore Moraitis, immediately paid the staff with private funds for a

period although they performed county services during this same period. This had the effect of reimbursing Orange County for any supposed loss.

Further, trial evidence was unchallenged, and the California Court of Appeal has so found, that all official county work was always first performed prior to any efforts being made on petitioner's campaign for Lt. Governor. See People v. Battin, 77 Cal App 3rd 635, 645. (Appendix, page 6)

Within the meaning of **Morissette v. United States, supra,** 342 U.S. 246, petitioner has been denied due process of law.

Certiorari should be accorded to resolve this threshold issue.

IV

CALIFORNIA PENAL CODE SECTION 424(2) IS UNCONSTITUTIONALLY VOID FOR VAGUENESS, IS UNCONSTITUTIONALLY OVERLY BROAD, AND CONSTITUTES AN EX POST FACTO LAW AS APPLIED IN THE INSTANT CASE, IN NOT OVERTLY STATING WHAT CONDUCT IS PROSCRIBED, AND IN ALLOWING THE DESIGNATION AS CRIMINAL OF THE USE OF AN ELECTED LEGISLATOR'S OFFICE STAFF FOR PERIPHERAL HELP ON AN ELECTION CAMPAIGN WITHOUT SPECIFICALLY SETTING FORTH THE ACTS PROSCRIBED.

A meaningful consideration of California Penal Code 424(2) can be undertaken only when it is

recognized that all of the tradition in the United States, at least in recent years, allowed, if not sanctioned, the use of the elected politician's staff to aid him in his quest for re-election.

In June of 1975, appellant led an abortive Orange County Board of Supervisors attempt to reorganize the investigative functions of the Orange County Sheriff's Department and the Orange County District Attorney's office. This effort resulted in a civil lawsuit filed by Hicks against appellant as one of the five members of the Board of Supervisors on June 27, 1975, and ultimately in a published appellate opinion, wherein appellant's official Board of Supervisors actions are quoted verbatim. See **Cecil Hicks v. Orange County Board of Supervisors** (1977), 69 Cal App 3d 228, 238, 244.

Partially as a result of appellant's efforts as reported in the appellate opinion, a political feud, exemplified by public insults, erupted between Cecil Hicks and petitioner. (See for example, Clerk's Supplemental Transcript, page 847A through 871). Appellant was indicted by the Orange County Grand Jury on August 13, 1975, for asserted illegal utilization of the supervisorial staff assigned to him in his quest for the nomination for Lieutenant Governor in early 1974.

In petitioner's quest for the Lieutenant Governor's nomination in 1974, petitioner made peripheral use of his staff only after all work was

done in the supervisorial office of an official nature. In fact, when petitioner learned in a May 8, 1974, Los Angeles Times newspaper article that such use of a Governmentally paid staff may be of questionable legality, petitioner immediately discontinued it and the staff was paid by private funds in a special account called "Friends of Battin."

Because of P.C. 424(2)'s failure to overtly set forth what acts are considered to be of proscribed nature, and because it is now allegedly interpreted to declare as criminal political office behavior commonly accepted as legal, lawful and traditional, we assert that the statute suffers from the quartet of constitutional infirmities ranging from

(a) void for vagueness;

(b) unconstitutionally overly broad;

(c) ex post facto law; and

(d) lack of notice to the criminal defendant as to what constitutes prohibited behavior.

These concepts are well set forth in recent decisions of the California Supreme Court:

(a) in **Bowland v. Municipal Court**, 18 Cal 3d 479, 491, the concept of constitutional void for vagueness was set forth as:

> (8)
> It is an established principle of constitutional law that ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

guess at its meaning and differ as to its application, violates the first essential of due process of law.'' (Connally v. General Const. Co. (1926), 269 U.S. 835, 391 (70 L. Ed. 322, 328, 46 S. Ct. 126); see also Smith v. Goguen (1974), 415 U.S. 566, 572-576 (39 L. Ed. 2d 605, 611-614, 94 S. Ct. 1242); Papachristou v. City of Jacksonville (1972), 405 U.S. 156, 162 (31 L. Ed. 2d 110, 115-116, 92 D. Ct. 839); People v. Barksdale (1972), 8 Cal 3d 320, 327 (105 Cal Rptr 1, 503 P. 2d 257); Note, the Void-for-Vagueness Doctrine in the Supreme Court (1960), 109 U. Pa. L. Rev. 67.)

In examining statutes challenged on vagueness grounds, courts have looked not merely at the hypothetical cases to which the statute has uncertain applicability, but also at the act allegedly committed by the charged defendant. (9) The presumptive validity of a legislative act militates against invalidating a statute merely ''. . . because difficulty is found in determining whether certain marginal offenses fall with . . . (its) language.

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.'' (United States v. National Dairy Corp. (1963), 372 U.S. 29, 32 (9 L. Ed. 2d 561, 565, 83 S. Ct. 594), citations omitted, italics added; see also Parker v. Levy (1974), 417 U.S. 733, 756-757 (41 L. Ed. 2d 439, 457-458, 94 S. Ct. 2547).)

The key phrase is that P.C. 424(2) is constitionally void for vagueness because that statute does not call the incumbent elected supervisor's attention to the fact that ''. . . his contemplated conduct . . .'' in the use of

his county-paid First Supervisorial staff is a proscribed criminal act in view of the omnibus tradition which either allows it or sanctions it.

Petitioner was the virgin to be deflowered by the statute in its first application to an elected California legislative office holder making use of his own staff to aid in his own election campaign. Since the statute clearly did not overtly proscribe this activity, it clearly suffers from the federal constitutional infirmity of void for vagueness and, as applied, it must be struck down and petitioner's conviction reversed.

Because petitioner, because of his conviction, is being deprived of his federal constitutional guarantee to seek office in the future, First Amendment rights are involved and

> ''. . . Greater precision of statutory language might well be required if First Amendment rights were involved. . .''

than if not. **Bowland v. Municipal Court,** 18 Cal 3d 479, 493, likewise addresses itself to unconstitutional overbreadth:

> (12) Statutes which prohibit constitutionally protected conduct are said to be overbroad and their enforcement may constitute a denial of due process. (Gooding v. Wilson (1972), 405 U.S. 518, 520-521 (31 L. Ed. 2d 408, 413-414, 92 S. Ct. 1103); Coates v. City of Cincinnati (1971), 402 U.S. 611, 614 (29 L. Ed. 2d 214, 217-218, 91 S. Ct. 1686); Aptheker v. Secretary of State (1964), 378 U.S.

500, 508 (12 L. Ed. 2d 992, 998-999, 84 S. Ct. 1659); Katzev v. County of Los Angeles (1959), 52 Cal. 2d 360, 367-368 (341 P. 2d 310).)

Greater precision of statutory language might well be required if First Amendment rights were involved. (See Smith v. Goguen, supra, 415 U.S. 566, at p. 573 (39 L. Ed. 2d at p. 612); Baggett v. Bullitt (1964), 377 U.S. 360, 372 (12 L. Ed. 2d 377, 385, 84 S. Ct. 1316); People v. Barksdale, supra, 8 Cal 3d 320, 327; Fort v. Civil Service Commission (1964), 61 Cal 2d 331, 339 (38 Cal Rptr 625, 392 P. 2d 285).)

Clearly, P.C. 424(2)'s application to the elected legislative office holder's use of his own staff to aid in his own re-election campaign is an overly broad application. We here deal with a statute that in no way even alludes to the behavior that the State of California now retroactively asserts to be criminal. As such, the statute is being applied in an overly broad manner.

(c) It is equally clear, therefore, that the statute is being applied, via prosecutorial and judicial interpretation, as an ex post facto law which makes criminal today something not overtly defined as criminal yesterday, and which fails to provide

(d) notice to the accused of what activity is deemed criminal. Unlike the traditional criminal statute which sets forth with clarity the behavior that is prohibited by it, P.C. 424(2) purports to disallow any activity unless it is affirmatively set forth by some sort of state law or county or municipal ordinance. The latter

is even of constitutionally questionable nature, for the opinion of Orange County Counsel Adrian Kuyper that the supervisorial staff need work no minimum number of hours in order to draw full pay, appears to be the only local effort to interpret the law in its alleged application to a County Supervisor making use of his office staff in his re-election campaign.

We find it hard to believe than an elected county legislator in the United States should have less protection under the criminal law than an elected United States Congressman. While states can provide more protection under their criminal laws than mandated under interpretations of federal laws, they surely cannot provide less.

Because of the tradition existing at all levels of government allowing an already elected legislator to make peripheral use of his staff to aid him in his own campaign for re-election, it is plain that use of California P.C. 424(2) to ensnare the first elected legislator in California creates federal constitutional dimension and suggests that said statute suffers from a void-for-vagueness, unconstitutional over-breadth, ex post facto lack of notice infirmity.

This Honorable Court should grant a hearing to

resolve these serious national issues of first impression. (Footnote 49)

V

PETITIONER, ORANGE COUNTY SUPERVISOR BATTIN, WAS THE VICTIM OF BIASED PROSECUTION BY ORANGE COUNTY DISTRICT ATTORNEY CECIL HICKS, WHO, AT THE TIME THAT HICKS SOUGHT, COMMENCED AND CONTINUED PROSECUTION OF BATTIN:

(a) WAS EMBROILED IN THREE FORMALLY FILED CIVIL MATTERS WITH PETITIONER (AS ONE OF FIVE MEMBERS OF THE (BOARD), IN ONE OF WHICH DISTRICT ATTORNEY HICKS WAS THE ACTUAL PLAINTIFF AND PETITIONER WAS ONE OF THE ACTUAL DEFENDANTS (SEE CECIL HICKS, DISTRICT ATTORNEY v. BOARD OF SUPERVISORS OF ORANGE COUNTY, 69 Cal App 3d 228, April 22, 1977);

Footnote 49: Indeed, it appears singularly anomalous that the *first reported* California decision which purports to hold a California elected legislator criminally liable without one iota of fraudulent intent, subjecting him to a 1-10 year prison sentence (suspended county jail alternately imposed), a $3,500 fine, and loss of ever again running for office was originally certified for non-publication! One would assume that the instant opinion purportedly elucidating even People v. Superior Court (Greer, 19 Cal 3d 255, ———Cal Rptr———, ———P.2d———, would surely be published as a warning beacon, to the *future* legislators, of the treacherous shoals lurking beneath the surface benignity of P.C. 424(2). On belated application of the Attorney General, the California Court of Appeal reversed its original decision to not publish.

(b) WAS PERSONALLY EMBROILED IN A PUBLICLY AIRED ACRIMONIOUS EXACERBATED EXCHANGE OF PERSONAL EPITHETS WITH SUPERVISOR BATTIN, WHOM HICKS ACCUSED OF PERSONALLY SPEARHEADING EFFORTS TO UNDERMINE THE FUNCTION OF HIS OFFICE BY PETITIONER'S ACTIONS ON THE ORANGE COUNTY BOARD OF SUPERVISORS, WITHIN THE MEANING OF HICKS v. BOARD OF SUPERVISORS, 69 Cal App 3d 228, 239 and 244.

(c) SUFFERED A CONFLICT OF INTEREST WHICH IN FACT PREJUDICED HIM AGAINST PETITIONER BATTIN, AND IN FACT UNDERMINED HIS IMPARTIAL EXERCISE OF JUDGMENT IN THE DISCRETIONARY FUNCTIONS OF HIS OFFICE AS ORANGE COUNTY DISTRICT ATTORNEY;

(d) WAS TO, AND DID, BECOME A MATERIAL WITNESS AGAINST PETITIONER, AND MEMBERS OF THE DISTRICT ATTORNEY'S STAFF WERE TO, AND DID, BECOME MATERIAL WITNESSES AGAINST PETITIONER;

(e) SOUGHT TO PERSONALLY GAIN, AND HIS TRIAL DEPUTY JACK RYAN SOUGHT TO PERSONALLY GAIN, FROM THE OUTCOME OF THEN-PENDING CIVIL LITIGATION AND THE UPCOMING CRIMINAL LITIGATION IN REMOVING PETITIONER FROM OFFICE;

(f) CREATED THE APPEARANCE OF A CON-

FLICT OF INTEREST ON THE PART OF THE DISTRICT ATTORNEY'S OFFICE;

(g) PERSONALLY WAS RESPONSIBLE FOR THE APPARENT AND/OR ACTUAL CONFLICT OF INTEREST EXISTING BETWEEN HIM AND PETITIONER, ORANGE COUNTY SUPERVISOR ROBERT W. BATTIN;

(h) CREATED INDIVIDUAL INSTANCES OF PRE-TRIAL UNFAIRNESS WHICH WERE ADDED TO INDIVIDUL INSTANCES OF UNFAIRNESS DURING TRIAL TO CONSTITUTE AT LEAST A CUMULATIVE CONSTITUTIONAL DIMENSION OF UNFAIR PROSECUTION EVEN THOUGH EACH WERE, ARGUENDO, OF SEAPARATE NON-CONSTITUTIONAL DIMENSION;

ALL WITHIN THE MEANING OF **PEOPLE v. SUPERIOR COURT (GREER)**, 19 Cal 3d 255, —— Cal Rptr ——, —— P. 2d ——— (3-30-77).

BECAUSE OF THIS, AS THE CALIFORNIA ATTORNEY GENERAL HAS CONCEDED, IN **PEOPLE v. SUPERIOR COURT (GREER)**, 19 Cal 3d 255, 262, 264, PETITIONER'S CONVICTION MUST AND SHOULD BE **REVERSED ON APPEAL**; A HEARING SHOULD BE GRANTED BY THIS HONORABLE COURT.

The pre-trial and trial record in this case, as developed inthe opening and closing briefs of petitioner filed in the California Court of Appeal, lucidly and

amply demonstrate a very marked conflict of interest existing between Orange County District Attorney Cecil Hicks and petitioner Battin; its duration had reached years into the past, and its effects were to mar pre-trial efforts in Mr. Hicks' selective, discriminatory prosecution of appellant-petitioner Robert W. Battin, a member of the Orange County Board of Supervisors.

The landmark opinion of the California Supreme Court, **People v. Superior Court [Greer]**, 19 Cal 3d 255, authored by Justice Mosk and unanimously joined by the other members of that Honorable Court, serves as a criteria to evaluate the wrongfulness of District Attorney Hicks' role in prosecuting petitioner.

A matrix comparison of Greer's mandates and the facts of the instant case serves to poignantly and perceptively herald the error mandating the grant of a hearing and reversal of petitioner's conviction of a "crime" without wrongful intent or mens rea:

CASE/ ISSUE	People v. Superior Court [Greer], 19 Cal 3d 255	People v. Robert W. Battin 4 Crim. 9051
1. Conflict of interest; inability to exercise impartial judgment	A prosecutor should not conduct a prosecution when "...he suffers from a conflict of interest which might prejudice him	Prosecutor Hicks publicly accused Battin of being a "tool" of certain individuals who were perceived to be conducting an Orange

CASE/ISSUE [Cont'd]	People v. Superior Court [Greer], 19 Cal 3d 255	People v. Robert W. Battin 4 Crim. 9051
	against the defendant and undermine his impartial exercise of judgment..." 19 Cal 3d 255, 258 (prosecutor employed in his office the mother of a murder victim and was then commencing prosecution of the wife of the murder victim and the wife's current male companion, Greer, for that crime.	County "shadow government" to undermine the Orange County District Attorney's office by, inter alia, transferring investigators away from the D.A.'s office; Hicks accused petitioner of being both a bad attorney and bad supervisor; Battin had publicly accused Hicks of drunkeness and alcoholism; Hicks was then the personal plaintiff in major litigation against the Orange County Board of Supervisors , of which petitioner was a member (Hicks v. Supervisors, 69 Cal App 3d 228);

CASE/ISSUE [Cont'd]	People v. Superior Court [Greer], 19 Cal 3d 255	People v. Robert W. Battin 4 Crim. 9051
		also in litigation involving salaries of that office (Orange County Employees Association v. County of Orange, No. 236-402, and in the litigation County of Orange v. Duncan, Cecil Hicks, et al., filed Dec. 24, 1975).
2. What personal or emotional involvement existed in the case? Was the district attorney personally involved or merely peripherally involved, via, as in Greer, an employee who worked in a minor non-legal capacity in the office?	An employee of the D.A., the mother of the homocide victim, was grief-stricken over her son's death; nothing indicated that the Contra Costa County District Attorney was personally or emotionally involved with or against the defendant; at best, the facts of	Here the District Attorney himself was personally and emotionally involved with and against defendant Battin in a major public name-calling contest; D. A. Hicks expressed personal exuberance when the Grand Jury indicted petitioner; Hicks was the personal

CASE/ISSUE [Cont'd]	People v. Superior Court [Greer], 19 Cal 3d 255	People v. Robert W. Battin 4 Crim. 9051
	Greer are less exacerbated than the personal and emotional involvement and antipathy directed by Hicks toward petitioner Battin.	plaintiff in litigation with petitioner Battin on a personal basis (Hicks v. Supervisors, 69 Cal App 3d 228; also involved in Orange County Employees Association v. County of Orange, No. 236-402, and County of Orange v. Duncan, Hicks, et al., No. 239-519).
3. Was the district attorney himself or were any of his staff to be witnesses against the defendant at trial?	The D.A.'s employee, Martha Anderson, was slated to be a material witness for the prosecution in the trial of Greer (19 Cal 3d 255, 259).	District Attorney Hicks, his deputies, his investigators, and his peripheral personnel all were to become, and did in fact become, material witnesses in pretrial matters in People v. Battin against petitioner Battin.

CASE/ISSUE [Cont'd]	People v. Superior Court [Greer], 19 Cal 3d 255	People v. Robert W. Battin 4 Crim. 9051
4. Was there potential gain to be achieved by success of the civil litigation or the criminal prosecution on the part of the District Attorney?	Solely the employee of the D.A. could gain by achieving custody of the minor child of the defendant wife, her ex-daughter-in-law. The D.A. or his personnel otherwise had no gain to be expected, civilly or criminally.	District Attorney Hicks stood personally to gain by eliminating petitioner from the office of the Board of Supervisors pursuant to the mandates of P.C. 424.2; in his civil litigation, Hicks stood to gain by quashing the removal of the 22 investigators from his office and by favorable salary increases for his deputies; and by continuing an inflow of money from narcotic defendants into police/ prosecutorial coffers.
5. What remedies available to the criminal defendant already convicted in a	The California Attorney General concedes that the remedy is "...reversal of any resulting conviction and professional discipline of the offending prosecuting attorney...";	

CASE/ISSUE [Cont'd]	
case where there has been a demonstrated bias and/or conflict of interest?	(19 Cal 3d 255, 262); "...and the Attorney General concedes that in similar circumstances a prosecutorial conflict of interest in criminal cases may require reversal of a criminal conviction in the appellate courts..."; it "...contemplates a waste of judicial resources in futile trials and inevitable reversals on appeal..." (19 Cal 3d 255, 264). We note in passing that Greer was more attenuated than Battin; Greer involved a mere District Attorney employee who was emotionally involved; in Battin, the District Attorney himself, Cecil Hicks, was emotionally and professionally involved and was the litigant in the several civil suits; the Court of Appeal must be making a "sick" joke in stating that the instant case is not as severe as Greer! See page 50, lines 12-22 of Slip Opinion, People v. Battin.

We have set forth in our statement of facts in this Petition for Certiorari that although petitioner had allegedly made peripheral use of his county-paid supervisorial staff to aid him in his quest for the lieutenant governorship of California in the 1974

primary, such use was never done at the expense of the necessary work of that office.

In fact, the California Court of Appeal concedes and finds at page 6 of the slip opinion:

> ". . . However, despite all these efforts by the defendant's staff, during regular working hours, it was uncontested at trial that the defendant's supervisorial work was accomplished during the February through June period . . ."

Indeed, although the work was allegedly done from February to June 4, 1974, it was not until mid-summer of 1975 that anything was done about it. That machinery was actuated in the following manner:

(a) One Dawn Ellen Papp had been a secretary in petitioner's First Supervisorial office during a portion of the election campaign;

(b) She left and obtained employment with an Orange County attorney, one William Dougherty, who coincidentally happened to be a close friend of District Attorney Cecil Hicks;

(c) Although Ms. Papp had mentioned the fact that the First Supervisorial staff had peripherally helped in the 1974 election campaign after all county work had been first and always completed, William Dougherty did not feel such was at all wrong, let alone criminal;

(d) In mid-1975, he learned of two things: (1) other political figures were coming under scrutiny

for similar acts by Mr. Cecil Hicks; and (2) Mr. Cecil Hicks was having troubles with the Orange County Board of Supervisors; member Battin had moved (successfully) the Board resolution to transferr 22 investigators from Hicks' staff to the staff of Sheriff Brad Gates (see **Hicks v. Board of Supervisors**, 69 Cal App 3d 228, 239, 244, directly quoting Battin), and Mr. Hicks had formally brought suit against Battin and the Board to quash the transfer;

(e) Acting with alacrity, attorney William Dougherty immediately contacted Hicks and related the story told him by Dawn Ellen Papp. Dougherty hand-picked the D.A. investigators to do the dirty work.

(f) Within a few weeks, Hicks and his deputies had petitioner indicted by the Orange County Grand Jury.

The record indicates than an acrimonious, publicly-aired personal antipathy had long existed between Hicks and Battin and on the day that the grand jury returned a True Bill, Hicks exuberantly flashed a "V for Victory" sign to press members learning of the result. The trial record contains a personal admission by Hicks of this "V for Victory" response. The public epithets hurled between the two men included Supervisor Battin terming Hicks a drunk, an alcoholic, and one unfit to run the affairs of the District Attorney's office; Hicks stated that he did not know if Battin was a "worse supervisor or a worse attorney," or vice-versa.

At the time of petitioner's indictment, it appeared

that he was to be the first publicly elected legislator in the nation to be tried for the "crime" of using peripherally his office staff to aid him in his election campaign. He was to be tried under, inter alia, a California Penal Code section providing for a 1 - 10 year term in the State Prison together with a disqualification to ever again run for or hold elected office at any level in the State of California. That conviction could occur, and the foregoing severe sanction could be imposed, without the State of California, represented by Mr. Cecil Hicks, ever demonstrating that petitioner had a "mens rea" or wrongful intent, although the charged crime clearly and impliedly accused petitioner of embezzling money from Orange County via his county-paid staff being used for his personal effort to become the 1974 Democratic nominee for Lieutenant Governor of California.

At the time of the indictment, Mr. Hicks had already personally sued petitioner and his associates civilly (see **Hicks v. Board**, 69 Cal App 3d 228, especially 239 and 244) over the 22 investigator transfer and two other suits were to, later, concomitantly link Mr. Hicks and Mr. Battin over sensitive and monetary matters.

Clearly, Hicks saw the Dawn Papp - Attorney Dougherty news as the vehicle to remove his major "thorn in the side," Supervisor Battin, from the Orange County Board of Supervisors via the mandates

of P.C. 424(2); as such, neither he nor his staff were to be amendable to any sort of discretionary decision making pre-trial or trial processes, or engage in the traditional plea bargaining. A conviction was mandtory and Hicks' conflict of interest with petitioner Battin cannot today be seriously challenged by the honest intellectual mind giving a neutral evaluation to the case.

(1) The California Supreme Court has said that a prosecutor cannot sanction any sort of a "conflict of interest which might prejudice him against a criminal defendant and undermine his impartial exercise of judgment." People v. Superior Court (Greer), 19 Cal 3d 255, 258. If he does, the prosecution should be assumed by the State Attorney General. Yet in spite of Mr. Hicks' personal involvement, he prosecuted the petitioner. This Court should elevate these mandates to Federal Due Process level.

(2) The California Supreme Court has said that a prosecutor should not try a defendant with whom he is embroiled in civil litigation. People v. Superior Court (Greer), 19 Cal 3d 255, 261. Yet Mr. Hicks prosecuted petitioner Battin, although Hicks was either then, or was to become, involved in three separate civil suits with petitioner prior to trial. This Court should elevate these mandates to Federal Due Process level.

(3) The California Supreme Court has said, inter alia, in People v. Superior Court (Greer), 19 Cal 3d 255,

266, that:

". . . A fair and impartial trial is a fundamental aspect of the right of accused persons that to be deprived of liberty without due process of law . . .;

". . . It is the obligation of the prosecutor, as well as the court, to respect this mandate . . ."

Yet, in the face of all of the foregoing mandates, the clear conflict of interest emanating from Hicks toward Supervisor Battin precluded Hicks from exercising discretionary power in either pre-trial or trial matters. Hicks' inability and the inability of those deputy district attorneys acting directly under him and at his behest, to exercise discretion fully compromised their impartiality and muted and reduced to a nullity their and his objective and impartial consideration of the instant case.

Orange County District Attorney Hicks had both a personal and emotional involvement in his lengthy and unpleasant relationship with Orange County Supervisor Battin that did truly bias his objective exercise of judgment. 19 Cal 3d 255, 267.

(4) Both Hicks and certain members of his staff were to become either pre-trial hearing or trial witnesses against petitioner Battin although the California Supreme Court has indicated that such a potentital possibility should give pause to consider whether that office should continue the prosecution or voluntarily recuse itself. (19 Cal 3d 255, 259). See

Comden v. Superior Court, L.A. 30787, 20 Cal. 3rd 906.

(5) Hicks and his deputies clearly stood to be affected by litigation in **Orange County Employees Association v. County of Orange**, No. 236402, and thus were placed in another clear-cut conflict.

(6) A particularly sensitive procedure employed in Orange County had caused the filing of **County of Orange v. Duncan, Hicks, et al.**, No. 239519. In this case, and once again, conflict potential clearly is presented.

Although the Fourth Appellate District (pages 44-47, Slip Opinion) seeks to "white-wash" the Hicks-Battin relationship, it is quite evident that the truth is otherwise.

Indeed, as an illustration of the gallant effort to keep clearly out of the opinion a discussion of the case, **Hicks v. Board of Supervisors**, 69 Cal App 3d 228, especially at 239 and 244, that court suggests that they need not consider the case since it had not been cited in petitioner's opening brief filed May 11, 1977. (Footnote 50)

Footnote 50: The Court of Appeal states at page 48, line 2, fn. 34 of the Slip Opinion: ". . . In his reply brief, defendant also cites two other cases which involved the District Attorney and himself. Because those cases were not included by defendant in his earlier brief, we need not consider them. . ." In fact, *Hicks v. Board*, 69 Cal App 3d 228 was cited to the Fourth Appellate District by its number, 4 Civ. 15785, and that court was told that the case *was then pending* before them! See page 87, lines 21-28, page 89, lines 11-16, page 90, lines 17-19, Opening Brief, *People v. Battin*.

We can only provide several key comments:

(a) (1) In fact, the Court of Appeal was in error when it says that petitioner did not include **Hicks v. Board of Supervisors**, 69 Cal App 3d 228 (April 22, 1977) in his opening brief; as we note in our next paragraph, at the writing of the opening brief, eventually filed on May 11, 1977, **Hicks v. Board** had not been decided so petitioner referred to it by 4 Civ. 15785, its number in the Court of Appeal, and advised that court of its pendency before it: page 87, lines 21-28; page 89, lines 11-16; page 90, lines 17-19, Opening Brief, **People v. Battin**, 4 Crim. 9051.

(2) The District Court also implied in its footnote 34 that it could not find mention of the suit between Hicks and the Board of Supervisors in the pre-trial motion. Said suit is referred to in the Clerk's Supplemental Transcript on Appeal, pages 704-705, 847-A, 857, 858.

(b) **Hicks v. Board of Supervisors**, 69 Cal App 3d 228, was filed April 22, 1977; this court can take judicial notice of the fact that it usually takes a few weeks for the opinion to be disseminated to the Bar and the public, not appearing in the advance sheets until later;

(c) Petitioner's opening brief was filed May 11, 1977; it was some 250 pages long and was printed; this court can realize that the writing of said opening brief occurred much before May 11, 1977, in order to allow for typing and printing and filing on May 11, 1977;

(d) The very same three appellate judges, Morris, Kaufman and McDaniel, of Division 2 of the Fourth Appellate District participated in **Hicks v. Board of Supervisors**, 69 Cal App 3d 228, as participated in **People v. Battin**, and the **Hicks v. Board of Supervisors** case was addressed in name and citation both in petitioner's final briefs and to oral argument before that very same panel. At oral argument, the Justices said that they, of course, knew of the case because they had decided it and caused its publication!

(e) Since that very same panel authored both opinions, the panel should have taken judicial notice of their own published decision which greatly affected the decision in **People v. Battin**, and they should have recognized that the sole reason that the case was not cited by official pagination and name (it was, of course, cited as 4 Civ 15785) in petitioner's opening brief filed May 11, 1977, was that **Hicks v. Board of Supervisors** was, itself, not filed until Apr. 22, 1977, making it impossible to have included the citation of the case because of lack of knowledge of it at the time the brief was written.

Such intellectual non-sequiturs mark the decision of the Court of Appeal, where the very same court refuses consideration of their own published opinion which has District Attorney Hicks suing civilly petitioner Battin at the time Hicks commences criminal prosecution of Battin, as express violation of the

mandates of **People v. Superior Court [Greer]**, 19 Cal 3d 255, 261, paragraph I, ". . . nor should a prosecutor try a defendant with whom he is engaged in civil litigation . . ."

Concomitantly with oral arguments in **People v. Battin**, on December 7, 1977, the Fourth Appellate District was about to deny review (Footnote 51) (concurred in by the California Supreme Court in denial of the People's petition for hearing) of Superior Judge Philip Schwab's (Footnote 52) disqualification of District Attorney Hick's attempt to prosecute two other Orange County Supervisors, Ralph Diedrich and Philip Anthony (C-38160) (**People v. Superior Court** (Diedrich and Anthony)).

Footnote 51: The Fourth Appellate District denied review on December 9, 1977; the California Supreme Court denied review on January 12, 1978.

Footnote 52: Orange County Superior Judge Schwab's full opinion is as follows:

"In support of their Motions to Recuse the District Attorney, the defendants allege several grounds. Those grounds appear to be as follows: (1) that the District Attorney and some members of his staff are embroiled in civil litigation with some of the defendants in this case; (2) that there is apparent prejudice existing in the office of the District Attorney against defendants Deidrich and Conrad; (3) that the District Attorney has an inherent conflict of interest in the prosecution of two of the five elected and co-equal officials who control the budget and operation of his office; and (4) that rules of professional conduct and of the conduct of legal proceedings preclude an attorney who may be a witness or an attorney in his office from taking the role of an attorney in the action.

"The defendants make specific reference to four cases in

(Footnote 52 continued on page 86)

Footnote 52 continued...
support of their contention that a conflict of interest exists by virtue of the prosecutor being involved in civil litigation with a defendant. It is true that a prosecutor should not try a defendant with whom he is embroiled in civil litigation. However, an examination of each of the cases referred to by the defendants shows that that is not presently the case. The judgment has become final in *Hicks vs. Orange County Board of Supervisors*, 69 Cal App 3d 228. *Orange County Employees Association vs. County of Orange*, Case Number 25 25 10, is a case in which neither the District Attorney nor his staff are parties. The District Attorney and his staff have been dismissed as parties to *County of Orange vs. Merrill Duncan*, Case Number 23 95 19.

"Mr. Conrad has filed a lawsuit in Federal Court naming Mr. Hicks, Mr. Capizzi and Mr. Gier as defendants but there has never been service of process and the issues have never been joined in that case.

"The Court is unable to make a finding that, in fact, there is prejudice existing in the office of the District Attorney against any of the defendants. The evidence that has been presented to the Court in support of that contention is by no means conclusive and, at best equivocal. *However, much of the public dialogue between individuals involved in this case has been sensational. In such an atmosphere, it may be difficult to present the issues to the jury in a calm, deliberate and rational manner.*

"Although the Board of Supervisors has no authority to direct the District Attorney in the exercise of his discretionary powers, it does prescribe the number, compensation, tenure and appointment of the District Attorney's staff. That is a unique and highly sensitive relationship. The fact that the defendants Deidrich and Anthony are members of the Board of Supervisors does not, per se, create a conflict of interest preventing the District Attorney from prosecuting the case. The defendants have asserted that the District Attorney has been motivated in this prosecution by a desire to retaliate but the evidence on that point has not been sufficient to prove that to be a fact. *Nevertheless, there does exist in the relationship of the District Attorney and the Board of Supervisors a potential for affecting or appearing to affect the District Attorney's objectivity and impartiality in the prosecution of this case. Not only is it absolutely essential that justice be actually served, it is also of vital importance that justice appear to be served.* Public confidence in the integrity and impartiality of our governmental system must be nurtured and encouraged in order for that system to serve the public good. A

(Footnote 52 continued on page 87)

Footnote 52 continued...
prosecutor is called upon to perform his duties with the highest degree of impartiality and integrity and to appear to be doing so, as well.

"Mr. Hicks has spoken personally with defendant Anthony concerning his campaign statements and, therefore, has personal knowledge which is evidentiary in nature. Mr. Cappizzi has personal information which has been characterized as highly incriminating. Thus, it is apparent that not only are each of them potential witness but, also, there may be a positive duty for the prosecution to call one or the other or both to testify. Mr. Crosby has stated categorically that Mr. Cappizzi will be called to testify. In the entire area of legal ethics, there are few subjects upon which there is greater unanimity than that of a lawyer being both a witness and an advocate in the same case. That subject has been dealt with at length in the Courts where it has been recognized that only in the most extraordinary circumstances should the lawyer, who is representing a client in a trial, or his law firm, remain active in the case if there is a likelihood that he will become a witness. Both the American Bar Association Code of Professional Responsibility and the Rules of Professional Conduct of the State Bar of California contain specific rules on that subject.

"The substitution of the Attorney General for the local District Attorney for the prosecution of given cases is a common experience which has been frequently resorted to with positive beneficial effect to the public. In this case, there are at least potential hazards to the District Attorney's objectivity and impartiality inherent in his official and personal relationships with some of the defendants; there is a probability that Mr. Hicks or Mr. Cappizzi or both will be called to testify at trial; and there is the need to assure the appearance of impartiality and propriety in the litigation of issues of such great importance to the individual defendants and to the public.

"The Court determines that the District Attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office. The defendants' motions are granted. The District Attorney is disqualified from prosecuting this case.

"The Attorney General is directed to appear before the Court in Department 15 at 9:00 a.m., Monday, November 21, 1977, to show cause, if any, why he should not prosecute the case.

"The defendants Ralph Deidrich, Philip Anthony, Eugene

Footnote 52 continued on page 88)

Footnote 52 continued...
Conrad and William Kott are directed to appear personally before the Court in Department 15 at 9:00 a.m., Monday, November 21, 1977, to enter their pleas to the charges against them.

"DATED: November 10, 1977.

Philip E. Schwab
Judge of the Superior Court"

The facts showed a much more heated controversy between Hicks and Battin than ever existed between Hicks and Diedrich-Anthony. Such denial of equal protection of the law to Supervisor Battin as was accorded to Supervisors Diedrich and Anthony is one of the constitutional deprivations inuring to Battin because of Hick's efforts engendered by bias and conflict of interest and prejudice. (Footnote 53)

Because of District Attorney Hicks' manifold violation of the requirements of **People v. Superior Court [Greer]**, 19 Cal 3d 255, a unanimous opinion of the California Supreme Court, and because of the refusal of the Fourth Apopellate District to accord its protection to petitioner, Supervisor Robert W. Battin,

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Footnote 53: As an illustration of District Attorney Hicks' antipathy toward Battin, and as an illustration of the events causing Superior Judge Philip Schwab of the Orange County Superior Court to grant recusal of Mr. Hicks in *People v. Ralph Diedrich and Philip Anthony*, C-38160, both Orange County Supervisors, in late 1977, it appears that following petitioner's conviction on one count of violation of P.C. 424(2), Ralph Diedrich termed the conviciton a "tragedy" to the news media. Orange County District Attorney Cecil Hicks became so incensed at board of Supervisor Chairman Diedrich that Hicks telephoned Board Chairman Diedrich in July, 1976, and called him a "dumb shit" on the telephone. The following colloquy taken from the official

Footnote 53 continued on page 89)

Footnote 53...
transcripts in the recusal motion in People v. Diedrich and Anthony on November 7, 1977:

DIRECT EXAMINATION BY MR. MORGAN:

Q. Mr. Hicks, back in I think it was July, 1976, on the occasion of the jury's verdict in the case of People vs. Battin, did you initiate a telephone call to Supervisor Diedrich?

A. I don't know the date; but I —approximately a day after that; verdict I initiated a telephone call to Supervisor Diedrich.

Q. Did you speak to Supervisor Diedrich about what he said to the press about that conviction when he characterized it as a quote, "tragedy"? Was that the subject matter of the telephone call?

A. The subject matter was the — the subject matter was what he said to the press. The details of what he said are — we did not go into on the telephone.

Q. I see. Did you, on that occasion, call Mr. Diedrich a "dumb son of a bitch" and so conclude the conversation?

A. It was not that precise language, but close.

Q. Close? I see. Whatever the modification, do you recall what it was now?

A. Yes, I do.

Q. What was it?

A. You want the whole conversation?

Q. No, just the difference between close and "dumb son of a bitch".

A. I called him a "dumb shit."

Q. "Shit." I see. And was that the end of the conversation?

A. Yes.

Within a year, Mr. Hicks was personally after Supervisor Diedrich and had him indicted also! Further, even after Mr. Battin had been removed from office, Mr. Hicks' chief lieutenant, Assistant District Attorney Michael Capizzi, was attempting to ensnare Battin in yet another phony charge, which did not materialize. Mr. Capizzi told the Orange County Grand Jury on August 2, 1977:

"Mr. Foreman, ladies and gentlemen of the Grand Jury, this morning we have two witnesses, a Mr. Fred McBrien, an attorney here in Orange County, and a Mr. Bill Stark, former resident in the county and now living in the Phoenix, Arizona area.

"And we expect to produce evidence concerning the development of Anaheim Hills, the Nohl Ranch property, and the allegations pertaining to possible bribery relating to the development of that land and three potential suspects, a Mr.

Footnote 53 continued on page 90

this Honorable Court should grant this Petition for Hearing. This Court should elevate the mandates of Greer, supra, 'to Federal Due Process dimension.

This case presents grave and serious issues warranting full review by this Honorable Court. The California Attorney General has conceded that the appropriate remedy is reversal of the conviction at the appellate state. **People v. Superior Court [Greer]**, 19 Cal 3d 255, 262, 264 (1977).

Footnote 53...
Michael Remington, an attorney in Orange County; Ralph Diedrich, a member of the Board of Supervisors; and Robert Battin, a former member of the Orange County Board of Supervisors."

Previously, before the subject indictment/conviction, the same Republican activist assistant District Attorney Capizzi tried to "frame Battin" with false charges in 1972. (See Reporter's Transcript on Appeal, pages 1790-1795). There, D.A. Capizzi and D.A. Investigator Gier solicited perjury from suspect Tad Fujita in an unsuccessful attempt to indict Battin just prior to the general election in which he was a candidate for re-election to the Orange County Board of Supervisors.

In 1971, former undercover District Attorney agent GENE CONRAD testified that he was assigned to gather information about petitioner which could be used for political blackmail purposes, a la J. Edgar Hoover, even though no criminal investigation was underway. Conrad was paid with public funds for his efforts in building a private dossier on petitioner for Hicks. (See R.T.A. 1290-1263.)

CONCLUSIONS

Because of the severe threshold constitutional issues of state-wide and national consequence, we pray for certiorari.

A hearing is necessary to resolve the due process deprivations resulting from:

(a) California P.C. 424(2) shifting to a criminal defendant the proof of the major element of the statute. **Mullaney v. Wilbur**, 421 U.S. 684.

(b) California P.C. 424(2) branding as criminal a larceny related offense without demonstration of a mens rea, or wrongful criminal intent, within the combined meaning of **Morissette v. United States**, 342 U.S. 246, and **In Re Winship**, 397 U.S. 358, 364.

(c) California P.C. 424(2)'s clear void for vagueness, unconstitutional overbreadth and ex post facto lack of notice posture, inasmuch as it fails to set forth explicitly the behavior that it seeks to proscribe, as it is applied in the case at bar;

(d) District Attorney Cecil Hicks' prosecuting of petitioner while personally embroiled in three major civil suits, while bearing personal antipathy toward petitioner and while selecting him for discriminatory prosecution because of his personal relationship to petitioner, all within the mandates of the California Supreme Court in **People v. Superior Court [Greer]**, 19 Cal 3d 255, and within the meaning of **Murgia v. Municipal Court**; see also **Hicks v. Board of**

Supervisors, 69 Cal App 3d 228, 239 and 244.

This is a case of profound significance and one of many, many significant issues. Its treatment by the Fourth Appellate District on the **People v. Superior Court [Greer]** issue is, at the most charitable level, intellectually dishonest; its treatment of the Morissette-Winship due process issue is truncated and sadly misses the point.

It is a blight on the state judicial process that a man honorably holding and discharging his elected and sworn duty can be stigmatized and subjected to opprobrium for the rest of his life by conviction of a crime of vague, unconstitutionally overbreadth, ex post facto nature, without demonstration of a mens rea or wrongful criminal intent.

In fact, the ruling of the jury on the five counts of P.C. 72 resulting in acquittals established that petitioner did not possess a specific wrongful criminal intent.

Such a result offends the thinking mind; such a result is truly a blight on the system that we are all sworn to uphold.

A hearing and full analysis are mandated in this case.

Certiorari should be granted.

Dated this 5th day of July, 1978, at Santa Ana, California 97201.

Respectfully submitted,

ROGER S. HANSON, Esq.
Attorney for Petitioner
Robert W. Battin,
a member of the Bar of the
Supreme Court of the
United States, and of the
Supreme Court
of California

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ROBERT WILLIAM BATTIN,
Defendant and Appellant

4 Crim. 9051
[Super.Ct. No. C-34528]

OPINION

APPEAL from the Superior Court of Orange County. Kenneth E. Lae, Judge. Affirmed.

Roger S. Hanson, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jay M. Bloom and M. Howard Wayne, Deputy Attorneys General, for Plaintiff and Respondent.

The defendant was charged by indictment with theft (Pen. Code, §§ 484-487), misuse of public funds (Pen. Code, § 424, subd. (2)), and presentation of fraudulent claims to the county (Pen. Code, § 72). Trial was by jury. The jury returned verdicts of guilty on the misuse of public funds count, not guilty on the fraudulent claims count, and was hung on the theft

count. The court later dismissed the theft count pursuant to the defendant's motion. Imposition of sentence was suspended, and defendant was given three years' informal probation on the condition that he serve six months in the county jail and pay a $3,500 fine plus penalty assessments. The court then suspended five of the six months of time to be served. Execution of the one month term was stayed pending this appeal.

Before trial, defendant filed two motions to dismiss. One was pursuant to Penal Code section 995. The other motion was based on supposed constitutional infirmities of the statute involved. Both motions were denied by the trial court; petitions for writs of prohibition on both these motions were denied by this court and the California Supreme Court. Otherwise, defendant filed a motion to dismiss based on alleged discriminatory prosecution, conflict of interest, and estoppel, together with an affidavit to disqualify the trial judge. These were also denied. After trial, defendant filed a motion for a new trial; this too was denied. Defendant now comes before us seeking reversal of his conviction on many grounds.

FACTS

Defendant Robert Battin was elected Supervisor of the First District of Orange County in 1968, and was reelected to the same post in 1972. Early in 1974, while serving as supervisor, he decided to seek the Democratic Party's nomination for Lieutenant Governor of California.

During the months up to the time of the primary (February to June 1974), the defendant spent approximately 15-20 hours per week at his supervisorial office. He spent most of his remaining time at his Santa Ana law office. Because of his incumbency as a county supervisor, the county supplied defendant with four rooms of office space, a Xerox machine, regular typewriters, and a MAG card electric automatic typewriter, all to be used for his work as county supervisor. He was also given a staff of county-paid workers. One of the staffers was attorney Ted Moraitis who served as manager of the supervisorial office. Moraitis testified at trial that he had the job of "co-ordinating office activities and carrying out instructions . . . received from Mr. Battin . . ."

After he decided to seek the nomination for Lieutenant Governor of California, defendant instructed Moraitis to have members of the supervisorial staff work on the campaign. Thereafter, from time to time throughout the months leading up to the June primary, the defendant would check on the staff's campaign activities or would question Moraitis about their progress. When asked, Moraitis would inform the defendant that the staff was performing campaign work during county working hours (approximately 8 a.m. to 5 p.m.). Just before the primary, the defendant informed the staff that the campaign was to take "priority." Throughout the campaign, the defendant paid no other people to work for his nomination, although he did

receive some volunteer help from his girlfriend and her friends.

Defendant's hiring practices relfected his interest in utilizing the staff for campaign work. When being interviewed by defendant and his assistant for her position as an executive secretary, Julie Helling Grimes was asked if she had prior campaign experience. She was also asked was her party affiliation was. Dan Ryan was informed, before being hired as a part-time worker, that Battin was running for a Democratic Party nomination and that if he (Ryan) would register as a Democrat, he would stand a better chance of getting a job. Ron Dosh, also on the staff, worked additional hours on the campaign because "if you didn't, you wouldn't have a job very long." Staff secretary, Janet Turner was hired after she brough Moraitis proof that she was registered as a Democrat. She was also asked, before being hired, if she objected to doing campaign work. Dawn Papp, who was hired as Mr. Battin's secretary, was told that he was running for Lieutenant Governor and that she "was expected to work on the campaign as part of her job."

During the period February through June 1974, the members of the supervisorial staff indicated performed the following to help secure defendant's nomination. Julie Grimes addressed envelopes to members of the Central Committee, addressed and stuffed newsletters announcing the defendant's candidacy and other political brochures, worked on lists

of polling judges, typed out and sent out press releases concerning the defendant's candidacy, made trips to printers' shops to pick up various political material, checked the defendant's campaign statements, picked up flowers, pins and name tags for defendant's March fund-raiser, made numerous phone calls to see if invitees planned to attend the fund-raiser, and wrote to the clerk of each county in California to obtain lists of polling judges. All these activities were performed during county business hours.

Steve Knobloch telephoned the clerk of each California county to obtain membership lists of the Democratic Central Committee. He later made repeat calls to some county clerks. He also contacted local television stations and inquired about commercial time for the defendant.

Dan Ryan's primary duty was to maintain an index card file that contained the names of defendant's constituents, as well as people outside the district and members of various organizations (i.e., Calif. Trial Lawyers' Assn., Sierra Club). In April and May 1974, Ryan addressed and mailed campaign material to some of these individuals during office hours. He also accompanied the defendant on afternoon campaign trips.

In May, Dawn Papp, a staff secretary, typed campaign letters authorized by the defendant, and addressed packets of political brochures. On May 14, she worked between 10 a.m. and 3 p.m. on the filming

of one of defendant's campaign commercials. During the weeks of May 27 and June 3, she spent most of her time in the supervisor's office during office hours addressing envelopes for campaign materials. After the June primary, she typed and ran off on the county MAG typewriter some 150-200 "thank you" notes to the defendant's campaign supporters, at the defendant's direction.

Janet Turner testified at trial that she spent between 60 and 70 percent of her office time on the campaign. Among her duties was copying off a campaign essay written by the defendant. On one occasion, the defendant himself told Turner to make 50 copies of the essay on the county equipment.

Patti Short, a staff secretary, typed campaign letters and labels for political literature between February and June. She also sent out "thank you" notes to the defendant's financial contributors.

Ted Moraitis obtained voter lists from the county recorder, researched campaign matters at the defendant's request, arranged a "coffee klatch" for defendant's campaign, drafted, ordered and picked up the invitations to the defendant's fund-raiser, solicited campaign contributions and worked on TV ads for the defendant. These activities were performed at various times throughout the day and evening. However, despite all these efforts by the defendant's staff, during regular working hours, it was uncontested at trial that the defendant's supervisorial work was accomplished

during the February through June period.

The atmosphere at the supervisor's office during this period was described at trial by Janet Turner: "There was a lot of secrecy in our office, hiding things from the other offices (that shared space on the defendant's floor), the campaign material being there, us working on county time doing mainly campaign work."

The county Xerox machine was located in an area common to other tenants of the building. Witness Turner described the procedures of Xeroxing off the defendant's campaign material: "When we were copying on the Xerox machine things that pertained to the campaign, we didn't leave the machine to go back to our desk or anything. We didn't want the other offices to see that material in the Xerox machine . . . I was told not to let any of the others see what I was doing." (Footnote 1) Finally, the campaign material which was stored in the supervisorial office was moved to the defendant's law office at his direction because "he didn't need the Grand Jury snooping around."

In the midst of all this activity, on May 8, 1974, Moraitis read a newspaper article stating that the use of county-paid staff for campaign work could be illegal. He discussed this with defendant, and they decided to remove all members of the supervisor's staff, except

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Footnote 1: This atmosphere of secrecy caused Turner to leave the supervisor's office after only two months service there.

Moraitis and Dawn Papp, from the county payroll for the period May 13-28. For those two weeks, they were to be paid from the defendant's personal funds. Papp and Moraitis were kept on the county payroll because Moraitis felt that both were doing "substantially" county work (versus campaign work), yet both continued to perform campaign activities. Even after the remaining staff members returned to the county payroll after May 28, the defendant instructed them, as already noted, to give the campaign effort "priority." This effort continued until "thank you" letters were sent to the defendant's supporters after the June 4 primary. Those letters announced that the defendant would run for State Senator from the 37th Senate District.

In July 1974, Dawn Papp left the supervisor's office and began working for attorney William Dougherty. At the time she was hired by Dougherty, Papp mentioned "something about working on defendant's campaign" to Dougherty. He later testified that he was unaware, at the time, that the use of a publically-financed staff in an election campaign was illegal. However, a year after Papp was hired, a number of Orange County officials were indicted for illegal campaign activities, including the use of county staff personnel on their campaigns. The publicity concerning these indictments reached Dougherty, and, in his words, "made me think that campaign activity by staffers was a crime, and frankly, I hadn't thought

about that before." (Footnote 2) Dougherty then encouraged Papp to make available to the district attorney's office the information about defendant's campaign activities. Papp's revelations led to an investigation of defendant and culminated in this conviction.

DEFENDANT'S CONTENTIONS

Defendant presents us with numerous grounds upon which he urges that his conviction be overturned. To accommodate discussion of these, we have roughly categorized defendant's grounds into six headings: (1) challenge to the application of Penal Code section 424, subdivision (2); (2) the constitutionality of Penal Code section 424, subdivision (2); (3) failures in proof and errors in jury instructions; (4) various procedural grounds; (5) claims of discriminatory prosecution; and (6) conflict of interest.

1. Challenge to the Application of Penal Code section 424, subdivision [2]

At the time of his conviction, (Footnote 3) Penal

Footnote 2: At the pretrial motion hearing, Dougherty testified that two events caused him to take action regarding defendant's office operations: ". . . the general tenor, and then the business about Hinsahw and all those other people [being indicted for illegal campaign activities] brought it to my attention . . . Then there was the furor about the transfer of the 22 investigators."

It is important to note that the reason Dougherty delayed in reporting the activity to the district attorney was simply that he was unaware that such activity was illegal until he learned that other officials were indicted for similar acts.

Footnote 3: Penal Code section 424, subdivision (2) was amended in 1977 to substitute a new determinate sentence for the former indeterminate one.

Code section 424, subdivision (2) provided in pertinent part: "Each officer of . . . any county . . . and every other person charged with the receipt, safekeeping, transfer, or disbursement of public monies, who . . . (¶) 2. . . . makes any profit out of, or uses the same for any purpose not authorized by law; . . . (i)s punishable by imprisonment in the state prison for not less than one nor more than 10 years, and is disqualified from holding any office in this state."

Initially, we must decide whether the staff's campaign activities constitute a misuse of public funds by the defendant and whether the type of evidence which must be presented to establish a violation of this section was presented to the trial court.

(a) Activities Constituted a Misuse of Public Funds

Turning first to whether the staff's activities constituted a misuse of public funds, we must first decide for what purpose staff salaries for February through June were paid. If county funds were paid out solely for county work, we must conclude that there was no misuse of funds. On the other hand, if staff members were being compensated with county funds for both county and campaign work, we must then determine whether the law authorizes the use of public moneys for campaigning.

In support of his contention that county salaries for February through June were paid out solely for county work, defendant relies on an opinion by the county counsel and certain testimony at trial. The August 28,

1975, opinion of County Counsel Adrian Kuyper was issued in response to defendant's inquirty asking "whether or not there is any minimum number of hours a staff member . . . must work in order to be entitled to compensation." Answering in the negative, Kuyper stated that the Orange County Personnel and Salary Resolution, which governs supervisorial staffs, exempts them from the general requirement that county employees work 40 hours per week and allows to the supervisor discretion in prescribing work hours for his staff. In concurring with this opinion, Michael Raith, Chief of Claims and Disbursing for Orange County in 1974, opined that supervisorial staffers could take an afternoon off and thereby work less than 40 hours per week yet be paid for 40 hours. (Footnote 4) However, Raith also stated, while it was acceptable for staff members to have time off that it was not permissible to require them to perform personal favors for their supervisors on county time even if their official duties had been completed.

It is clear from the record that the defendant's employees were being paid, in part, for their campaign work, despite the fact that defendant was empowered to give them occasional time off. Staff time sheets for the period February through June of 1974 credited fulltime staffers, such as Ted Moraitis and Julie Helling

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Footnote 4: County Counsel Kuyper testified at trial that, in his opinion, staffers had to work at least a "reasonable" number of hours to be paid for 40 hour weeks.

Grimes, for 80 hours work for each two-week pay period. No accounting was made on the time sheets for the fact that part of these 80 hours was devoted to campaign work. Staff salaries were paid on the assumption that the figures appearing on the sheets represented the number of hours of county work. (Footnote 5) The same was true of part-time members of defendant's staff. Because of defendant's failure to request that the staff be paid only for those hours actually devoted to county work, the evidence shows that at least part of their pay for February through June was for work performed on behalf of defendant's campaign.

(b) **Defendant's Use of Public Funds for His Campaign**

We must now determine if it was, indeed, defendant who utilized county salaries to advance his campaign. The Personnel and Salary Resolution provided that "the head of [the] department [here, the defendant] shall file a written certificate with the Auditor-Controller to the effect that each of his employees, during said pay period, has performed services for the County as required by law. (Footnote 6) If there is any exception, the Department Head shall so state in his certificate." (Emphasis added.) Accordingly, defendant approved the staff time sheets for

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Footnote 5: Mr. Raith, who was in charge of the office that made out the employees' checks, so testified at trial.

Footnote 6: At trial, Raith testified that the "services required by law" were *county* services.

February through June by signing his name (Footnote 7) to the following certification which appeared on each sheet: "I hereby certify that each of the employees listed . . . has performed the services as set forth thereon, and I hereby authorize and approve payment of salary to each of these employees as provided by the Personnel and Salary Resolution."

At trial, Raith testified that defendant's certification was "a disbursement of [county] funds" because, without it, staffers would not have been paid. Upon receipt of time sheets bearing defendant's certification, Raith's office routinely issued staff pay checks.

Defendant contends, however, that he did not "disburse" public moneys within the meaning of section 424, subdivision (2) because he did not have actual custody of the moneys paid to his staff. To support his argument, defendant relies on the legislative history of the section and on **People v. Knott**, 15 Cal.2d 628, and **People v. Dillon**, 199 Cal. 1. The same contention, and the same authorities were utilized by the defendant in **People v. Qui Mei Lee**, 48 Cal.App.3d 516. The court therein, however, rejected the defendant's contention, holding that **Knott** and **Dillon** did not limit section 424, subdivision (2)'s applicability solely to officers having actual custody of

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Footnote 7: For a few pay periods during February through June, defendant was out of town and therefore unable to approve the time sheets, so Moraitis affixed defendant's signature stamp to the sheets. The time sheets for the remaining pay periods were approved personally by the defendant.

public funds. In fact, the court in **Qui Mei Lee** stated that defendant's approval of invoices for medical and lab services, which were then automatically paid by the county auditor, enabled defendant to control the disbursement of public moneys within the meaning of the statute. Similarly, in **People v. Sperl**, 54 Cal.App.3d 640, the defendant had authorized his secretary to credit county employees with hours spent on non-county activities. The Court of Appeal upheld the defendant's conviction under section 424, subdivision (3), stating: "... the ... time records 'related' to the disbursement of public moneys. These records were used as the basis for the disbursement of county funds to the various employees ..." (**Id.** at p. 656.) (Footnote 8)

As in **Qui Mei Lee** and **Sperl**, defendant here authorized the expenditure of county moneys for non-county activities. (Footnote 9) Defendant's certification on the staff time sheets was, indeed, a "disbursement" of public moneys within the meaning of section 424.

Footnote 8: In addition, the court in the cited case found meritless defendant's contention that he did not violate section 424 because the county controller, not he, issued the paychecks. (*Id.* at pp. 658-659.)

Footnote 9: We are unpersuaded by defendant's contention that it was Ted Moraitis and not himself who wished to use the staff on the campaign, and that defendant was ignorant of such use. The evidence presented at trial simply does not substantiate defendant's version of the facts on this point.

(c) Diversion of Services Constitutes Misuse of Public Funds

Finally, defendant contends that he cannot be convicted of misuse of public moneys because only services and not public moneys were involved. A similar contention was advanced in **Sperl**, wherein the defendant ordered his deputies to use the county vehicle on county time to transport an official and his family on personal errands. The court upheld the defendant's conviction based on section 424, subdivision (1) (misappropriation of public moneys), stating that: "defendant as a county officer misappropriated county funds (salaries) for personnel performing activities which were clearly outside the scope of their proper duties. Under such circumstances the trial court properly found that the transportation of Hayes, his family and staff resulted in a substantial monetary loss to the county by reason of the payment of the deputies' salaries while performing these improper tasks and that this constituted a misappropriation of public moneys within section 424, subdivision 1." (**People v. Sperl, supra**, 54 Cal.App.3d 640, 658.)

The holding in **Sperl** makes clear the fact that salaries are "public moneys" within the meaning of section 424, and that one who authorizes the illegal payment of salaries has violated that section. Hence, defendant's argument is without merit. Stated otherwise, as a consequence of the holding in **Sperl**, it is our view that defendant's diversion of county

employees to the performance of tasks in aid of the defendant's personal political campaign amounted to a use of public moneys for a "purpose not authorized by law."

2. The Constitutionality of Penal Code section 424, subdivision [2]

Having established that defendant, an official charged with the disbursement of county funds, misused those funds in violation of section 424, subdivision (2) we now address the contention that this section suffers from constitutional infirmities.

(a) Penal Code section 424, subdivision [2] is an ex post facto law

Defendant first claims that the application of section 424, subdivision (2) to the facts here violates the constitutional prohibition against ex post facto laws in that it later makes criminal certain conduct which was innocent when done. To support the theory that using publically funded staff members on campaigns is permissible, defendant refers to two opinions of County Counsel Adrian Kuyper, and to what defendant calls the "widespread and sanctioned" use of public supported staffers for campaigning. The first Kuyper opinion simply stated that the defendant's staff did not have to work a certain number of hours to be entitled to

be paid. (Footnote 10) Despite defendant's wish to the contrary, this opinion cannot, by any stretch of the imagination, be construed to authorize the use of county paid staff in a campaign. The second opinion stated that the county should pay for newsletters sent to the supervisors' constituients when such newsletters pertained to matters of county interest. As mentioned before, defendant's staff used county time to mail out newsletters in February that announced defendant's desire to run for Lieutenant Governor of California. The April newsletters that were sent out contained remittance envelopes for those who wished to mail in campaign contributions. Both sets of newsletters were mailed to constitutients and non-constituients alike. We fail to see how the county counsel's opinion can be viewed as sanctioning defendant's behavior in mailing newsletters concerning his campaign to non-constitutients.

Otherwise, defendant refers to numerous newspaper articles and Congressional Committee Reports which reveal that many federal officials use their staffs for campaign work. While we note that defendant speaks only of federal officials, we observe that officials in this state have been indicted and/or convicted for

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Footnote 10: Defendant also contends that his conviction was unfair because he relied on this opinion in having the staff devote county hours to his campaign. We find it odd that defendant claims such reliance when the activities in question occurred between February and June 1974, and the opinion was issued in August 1975, over a year later.

precisely the kind of activities engaged in by defendant. (See **People v. Holtzendorff,** 177 Cal.App.2d 788; (Footnote 11) **People v. Sperl, supra,** 54 Cal.App.3d 640.) (Footnote 12) Activities that are analogous to those here have also been condemned. (See **People v. Nathanson,** 134 Cal.App.2d 43; (Footnote 13) **People v. Harby,** 51 Cal.App.2d 759.) (Footnote 14) In **Mines v. Del Valle,** 201 Cal. 273, 287, the Supreme Court reviewed the use of public funds to support a bond issue. The court's language therein in instructive: "To

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Footnote 11: In *Holtzendorff,* the defendant, an official of the Los Angeles Housing Authority, used 19 Authority staffers and office equipment rented at the Authority's expense to assist in a political campaign. The counts against defendant alleging violations of section 424 were dismissed because the court found that the Authority was a public corporation and not a division of state, county or city government within the meaning of section 424. However, the counts alleging violations of Penal Code section 504 (embezzlement of public moneys) were allowed to stand. The staff activities in *Holtzendorff* were strikingly similar to those in this case. (See pp. 803-804.)

Footnote 12: In *Sperl,* employees of the Los Angeles County Marshal's Office used county time to lobby for favorable legislation in Sacramento. They also used county time to make phone calls soliciting support for then-Assemblyman Hayes' candidacy for county supervisor. Marshals also used county time to chauffeur Assemblyman Hayes and his family on private errands. The Court of Appeal upheld convictions of criminal offenses as to each of these activities.

Footnote 13: Nathanson, a city councilman, used official city stationery in his campaign for reelection. The trial court's order, setting aside the indictment, was reversed by the Court of Appeal.

Footnote 14: Harby used city-owned vehicles for unauthorized purposes. He was convicted of a violation of section 504, embezzlement of public moneys.

use . . . public funds to advocate the adoption of a proposition which was opposed by a large number of . . . electors would be manifestly unfair and unjust to the rights of [electors who opposed the proposition] . . ." (**Mines v. Del Valle, supra,** 201 Cal. 273, 287, revd. on other grounds, 17 Cal.3d 206, 223.)

Facts similar to **Mines** were present in **Stanson v. Mott,** 17 Cal.3d 206, in which the California Supreme Court said: "[E]very court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not explicitly authorized [citations] or on the broader ground that such expenditures are never appropriate. [Citation.] . . . [¶] Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. **A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions.** A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office [citations]; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process . . . [¶] . . . [T]o date, the

judicial decisions have uniformly held that the use of public funds for campaign expenses is as improper in bond issue or other noncandidate elections as in candidate elections." (Id. at pp. 217-218; emphasis added.)

In light of this recent pronouncement by our Supreme Court, as well as the other authorities cited above, we cannot agree with defendant that the use of a publically funded staff for campaign purposes is "sanctioned" by the law, written or unwritten. Section 424 has been on the books since 1872 and has been utilized in the past against officials who used public funds for political campaigns. In the face of all this, defendant has not convinced us that the application of section 424 to his activities was unique or violated the constitutional prohibition against ex post facto laws.

(b) Penal Code section 424, subdivision [2] Is Vague

Next defendant contends that section 424, subdivision (2) is unconstitutional because, as a result of its vague phrasing, it fails to give the individual fair notice of the behavior it proscribes. Defendant specifically refers to the language "for any purpose not authorized by law" as being vague. He further contends that he cannot be punished for using the staff on his campaign because such activity is not per se proscribed anywhere in the Penal Code. This is so according to defendant because there exists nowhere in the statutes a list of powers which supervisors are authorized by law to exercise. Finally, he contends that

the prohibitions expressed in section 424, subdivision (2) inhibit First Amendment rights; therefore, the language of the section should be more specific than it is.

In answer to defendant's first contention that section 424, subdivision (2) is vague, we begin with the general principle of law that a penal statute is presumptively valid and " ' " [r]easonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." It will be upheld if its terms may be made reasonably certain by reference to other definable sources.' [Citations.]" (People v. Superior Court [Hartway], 19 Cal.3d 338, 345.)

Section 424, subdivision (2) is clear in its language. It prohibits the use of public moneys for any purpose which has not, to that time, been explicitly authorized by state statutes or local ordinance. The fact that governmental officials are permitted to expend public funds only for those purposes explicitly approved was reiterated by the California Supreme Court in Stanson v. Mott, supra, 17 Cal.3d 206: "We start with the general principle that expenditures by an administrative official are prpoer only insofar as they are authorized, explicitly or implicitly, by legislative enactment. Contrary to defendant's contention below, such executive officials are not free to spend public funds for any 'public purpose' they may choose, but must utilize appropriated funds in accordance with the

legislatively designated purpose." (Id. at p. 213.)

An examination of California law, as it relates to the power of county supervisors, reveals constant reference to the term "not authorized by law." In **Merriam v. Board of Supervisors**, 72 Cal. 517, the California Supreme Court said, of supervisors, "[i]f they willfully appropriate moneys for a purpose not authorized by positive law, they are liable civilly and criminally." (Id. at p. 519; emphasis added.)

Government Code section 25042 provides, in part: "Any supervisor who . . . (d) wilfully, fraudulently, or corruptly attempts to perform an act as supervisor which is unauthorized by law . . . forfeits to the county five hundred dollars ($500) for every such act . . ." (Emphasis added.)

The powers of supervisors are enumerated in the Government Code at sections 25200 et seq. (Footnote 15) Those powers are limited to those explicitly set forth in the Government Code and all incidental powers necessary to carry out the enumerated ones. (**County of Modoc v. Spencer**, 103 Cal. 498, 501.) The reason for this limitation on supervisors' powers is simple; the position of supervisor was legislatively created and the authority for any act a supervisor performs must

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Footnote 15: All the powers in section 25200 et seq. are well defined except that power provided for in section 25207 which states that the supervisors may "perform all other acts and things required by law not enumerated in this part, or which are necessary to the full discharge of the duties of the legislative authority of the county government."

therefore be grounded on statute. (**County of Modoc v. Spencerr, supra,** 103 Cal. 498, 499; 51 Ops. Cal.Atty.Gen. 190, 193; 42 Ops. Cal.Atty.Gen. 25, 26; 29 Ops. Cal.Atty.Gen. 183-184; 17 Ops. Cal.Atty.Gen. 161, 162.)

Nowhere in Government Code section 25200 et seq. is there authority for using public moneys on political campaigns. Section 424, subdivision (2), like other statutes governing the powers of supervisors, works in reverse of most penal statutes that apply to ordinary citizens. Rather than prohibiting specifically enumerated behavior, it prohibits any behavior which has not been previously approved by statute or ordinance. (Footnote 16)

In **People v. Sperl, supra,** a similar "void for vagueness" attack was made on section 424, subdivision (1), which contains the "without authority of law" language. In response to defendant's contention that the statute did not give him fair warning of what conduct was proscribed, the Court of Appeal stated: "It was reasonable for the trial court to have

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Footnote 16: In cases involving violations of Penal Code section 424, subdivision (2), officials were prosecuted for committing acts which were not specifically condemned by other laws, but which were simply not authorized by law. (See *People v. Dillon, supra,* 199 Cal. 1; *People v. Wilson,* 117 Cal. 242; *City of Los Angeles v. City Bank,* 100 Cal. 18; *People v. Schoeller,* 96 Cal. App.2d 55.) As stated in *Dillon* in 1926, "[i]t has continuously been the policy of the law that the custodians of public moneys . . . should hold and keep them inviolate and use or disburse them only in strict compliance with the law." (*Id.* at p. 12.)

found that defendant knew his conduct was forbidden by the statute. Evidence . . . showed defendant personally, and with the aid of his colleagues, **removed evidence of these transactions** from official county records **to prevent such conduct from coming to light.** Neither the statute nor the court's interpretation of it are unconstitutionally vague.'' (54 Cal.App.3d 640, 661; emphasis added.)

As in **Sperl**, the defendant here attempted to secrete the evidence of his staff's activities. From this we can imply, as did the court in **Sperl** that defendant was aware of the illegality of his course of conduct. Beyond this, the knowledge he gained on May 8 via the newspaper story gave him sufficient notice. Yet, the activities continued. In light of this, and of the fact that many statutes governing the powers of supervisors carry this ''without authority of law'' language, we cannot agree with defendant that section 424, subdivision (2) is vague.

(c) To Affect First Amendment Rights, Penal Code section 424, subdivision [2] Must Be More Specific

Defendant also contends that where a statute affects First Amendment rights, its language must be specific. Defendant sees section 424, subdivision (2) as restricting the ability of county workers to campaign.

(Footnote 17) Section 424, subdivision (2), however, restricts campaigning only during county work hours. After 5 p.m., and on weekends, county workers, like any other citizen, are free to campaign as much as their own time will permit. To suggest that the county must allow its workers to utilize tax-funded time for campaigning is a distortion of the law.

(d) Penal Code section 424, subdivision [2] Is Overbroad.

Defendant advances the argument that section 424, subdivision (2) is void because it is overbroad. Generally, statutes which are overbroad are those ''which prohibit constitutionally protected conduct.'' (**Bowland v. Municipal Court**, 18 Cal.3d 479, 493.) Although defendant fails to specify what constitutionally protected behavior section 424, subdivision (2) restricts, we surmise that he refers to the restriction it allegedly places on county workers' ability to campaign. We have already considered and discounted this contention above. Further elaboration of this point is unnecessary.

(e) Penal Code section 424, subdivision [2] Violates the

Footnote 17: Defendant contends that because his staff could have been given time off, the work they performed on the campaign was on their own time. Again, we state that defendant's ability to allow the staff to take occasional time off is a far cry from a systematic plan to utilize, even coerce, the staff into working for his nomination. This is not a case in which an employee, with an afternoon off, is asked if he or she would like to help defendant with his campaign. This is a deliberate scheme to convert county workers into part-time campaigners.

Separation of Powers Doctrine

Defendant alleges that the separation of powers doctrine precludes using section 424, subdivision (2) to punish his misuse of public moneys because such use robs the Legislature of its ability to regulate the executive branch. For this proposition defendant cites us to **Public Citizen, Inc. v. Simon,** 539 F.2d 211. Therein, the District of Columbia Court of Appeal recited the rule that federal-taxpayer challenges to executive spending may be brought only when the taxpayer demonstrates that the expenditure "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power . . ." (Id. at p. 214.) The court explained that this restriction was necessary to prevent exposing "to taxpayer challenge every appropriation act whose administration requires the outlay of money, and . . . thrust[ing] the Judiciary into conflict with the other branches of government without the direct, particularized harm that lends legitimacy and urgency to the call on the courts to act." (Id. at pp. 213-214.) Thus, court review of federal executive spending absent a specific limitation on the spending power to serve as a guide must be prevented. In contrast to the situation in Simon, we have here a specific penal prohibition against spending county funds for any purpose not already authorized by law. We are not being asked to decide, without the aid of guidelines, whether or not defendant's expenditure was illegal. The litmus paper

of legitimacy is the test to be applied and can be easily administered by the courts. Had the Legislature not intended thus to restrict the spending of county funds, it would not have enacted section 424, subdivision (2) and other similar provisions, and would not have empowered the courts to impose sanctions on those who violated those provisions.

3. **Failures in Proof and Errors in Jury Instructions**

Defendant claims that a violation of section 424, subdivision (2) was not demonstrated at trial because the specific dollar amount of loss to the county, by virtue of defendant's activities, was not proven, and that the jury could not have found that defendant's behavior constituted a specific intent crime because specific intent instructions were not given at trial.

(a) Proof of Violation of Penal Code section 424, subdivision [2]

As to this ground for reversal, defendant cites no authority to support his claim that a specific dollar amount loss must be demonstrated in Penal Code section 424, subdivision (2) cases. We can locate no statutory or case law which requires it. Accordingly, we must conclude that defendant's point is without merit.

Defendant argues that his conviction should be overturned (1) because he relied in good faith on the County Personnel and Salary Resolution, and (2) because his conviction was not supported by substantial evidence.

As to the first point, defendant relies on **Stanson v.**

Mott, supra, 17 Cal.3d 206, to argue that his good faith reliance on the salary resolution creates a valid defense to the crime for which he was convicted. However, Stanson was a civil suit to recover public funds brought by a taxpayer against an official who had allegedly misused those funds. The plaintiff therein claimed that an official who misused public funds was strictly liable to the taxpayer for the money lost. Rejecting this view, the court declared that such an official may be personally liable, in tort, only if he failed to exercise due care or to demonstrate good faith in expending the funds. In citing Stanson, defendant here attempts to relate the civil law to his criminal conviction. As in the case of oranges and apples, the two simply cannot be treated analogously. (Footnote 18)

Next, defendant contends that his conviction is not supported by substantial evidence. The rule governing our review of the evidence was set forth in People v. Mosher, 1 Cal.3d 379, 395: ". . . this court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] . . . If the circumstances reasonably justify the trial court's findings, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with

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Footnote 18: Beyond this, defendant has failed to persuade us that "good faith" entered at all into his decision to order the staff to work on his campaign.

a contrary finding. [Citations.]"

We have carefully reviewed the extensive record in this case, especially noting defendant's reference to the facts which he believes exonerate him. Our review reveals a deliberate and planned scheme by which defendant utilized, for campaign purposes, any spare moment of his staff's county time. We also note an extensive use of county office equipment, as well as use of defendant's position, as a county official, to obtain advantageous information that may not have been so readily available to his opponent. We further note that in May, defendant became acutely aware of the illegal nature of his activities, but, rather than stopping them at that point, he continued such activities with greater intensity and secrecy. In his attempt to contradict all this evidence, defendant lays out an elaborate accounting of the total amount of campaign literature sent out by his county-paid staff (5,140 pieces). Even if we were to accept this figure as accurate, it remains a fact that the county staff engaged in many types of campaign activities, not just in the disbursing of political literature. In addition, we note that section 424, subdivision (2) is not a quantitative statute; its proscription is not limited to the misuse of public funds in a particular monetary amount. Rather it proscribes any misuse, no matter how small. It is apparent, from the record, that the People have presented substantial evidence of defendant's crime.

(b) **Errors in Jury Instructions**

Next, defendant advances several theories to prove that violations of Penal Code section 424, subdivision (2) constitute "specific intent" crimes, and that because the jury here was not given "specific intent" instructions, he could not have been convicted of violating that section.

Defendant states that the jury was given a "strict liability" (Footnote 19) crime instruction. In fact, however, the trial court gave the standard "general intent" instruction. (Footnote 20) It thus remains for us to determine if a violation of section 424, subdivision (2) constitutes a "general intent" crime or a "specific intent" crime.

Defendant argues that a violation of section 424, subdivision (2) constitutes a specific intent crime because: (1) the section deals with larceny or embezzlement, both of which are specific intent crimes; (2) section 424 contains no clause stating that specific intent is not required to constitute a violation; and (3) defendant acted in good faith and therefore should have had the benefit of a "specific intent" instruction.

Contrary to defendant's first contention, it is clear that section 424 is neither an embezzlement statute, nor does it require proof of specific intent. (**People v. Holtzendorff, supra,** 177 Cal.App.2d 788, 795-796;

Footnote 19: Defense counsel seems to lose sight of the basic distinctions between "specific intent," "general intent," and "strict liability" crimes. "Specific intent" crimes are those wherein the defendant is aware of and desires the consequences of his actions. "General intent" occurs when the act is knowingly or willfully done. The defendant is presumed to have intended all he did and all consequences thereof. "Strict liability" crimes are those which, unlike "general intent" and "specific intent," do not require the union of criminal acts and criminal intent. (17 Cal.Jur.3d, Criminal Law, §§ 59, 60, 64.)

Defendant cites *Morissette v. United States,* 342 U.S. 246. *Morissette* merely states that the element of intent was not eliminated by Congress from the crime of knowing conversion of government property. It did not hold, as defendant claims, that any form of larceny (including misuse of public funds) must be declared a "specific intent" crime. Unquestionably, criminal intent is an element of a section 424, subdivision (2) violation and such intent is general. The jury received a proper "general intent" instruction.

Footnote 20: Defendant offered at trial the following jury instruction: ". . . that the commission of the crime of the violation of 424.2 [sic] of the Penal Code alleged in Count II of the indictment requires specific intent. As charged you must find Mr. Battin not guilty of that offense unless it is proved beyond a reasonable doubt that he had the specific intent to use county funds for the unauthorized purpose of paying persons for working on his campaign."

The trial court refused this instruction, and used the following:

"[T]here must exist a union or join operation of act of conduct and general criminal intent. To constitute general criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

This instruction is taken verbatim from CALJIC section 3.30 (1975 Revision).

(Footnote 21) **People v. Dillon, supra,** 199 Cal. 1, 11.)
(Footnote 22)

As to his second assertion, it is true that section 424 contains no clause which provides that violations of it are "general intent" crimes. However, our review of the list of Penal Code sections with which defendant supplied us reveals that many general intent crimes are not so designated on their face (by means of such a phrase), but, rather, have been labeled "general intent" crimes by court decisions. Therefore, we fail to see why a violation of section 424, subdivision (2) cannot, like violations of other sections, be designated a "general intent" crime by court decision. In practice it has been.

Finally, defendant relies on the **Dillon** case to argue that because he acted in good faith, he was entitled to a "specific intent" instruction. In **Dillon**, the California Supreme Court made mention of the argument, also advanced by defendant here, that if public moneys were disbursed illegally, yet in good faith, the official who disbursed them should not be

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Footnote 21: The court herein took note of the fact that several courts had labeled section 424, subdivision (2) an embezzlement statute. It is noted, as well, that the word "embezzlement" appeared in section 424's title. Despite this, the court found that section 424 and the embezzlement of public funds statute, section 504 were distinguishable.

Footnote 22: Defendant attempts to utilize the doctrine of *ejusdem generis* to argue that section 424, subdivision (2) is a specific intent crime. However, we find the mandate on *Holtzendorff* and *Dillon* to the contrary to be quite clear.

punished. However, the court dismissed the argument, stating that it had no application to the facts then before it. A "specific intent" instruction was not called for here.

(c) **Consequences of Conviction**

Defendant next claims that he was convicted of a misdemeanor and that his acts did not involve moral turpitude. He contends, therefore, that he should not be disqualified from holding public office in the future.

In support of his first point, defendant cites **People v. Simon,** 227 Cal.App.2d 849. Therein, the defendant was convicted of violating Penal Code section 476a, for which a term in state prison or county jail could be imposed. The court relied on Penal Code section 17, subdivision (b) in declaring the defendant's crime to be a misdemeanor because that section provides "(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor . . ." (Emphasis added.) As the Attorney General correctly points out, however, section 424, subdivision (2) does not provide for alternative sentences as does section 476a, but stipulates that time shall be served **only** in the state penitentiary. Defendant's crime, therefore, cannot be deemed a misdemeanor under Penal Code section 17, subdivision (b) or **Simon.** Rather, it falls within the Provisions of Penal Code section 17, subdivision (a), which defines a

crime punishable by state imprisonment as a felony. (Footnote 23)

Defendant also urges us to "rule" that the activities for which he was convicted did not involve moral turpitude, thus, he should not be disqualified from seeking elective office. However, section 424 specifically provides that those found guilty of violating it shall be disqualified from holding public office. We are powerless to contradict the clear language of the section, and we find it unnecessary to pass upon the moral nature of defendant's acts.

4. Procedural Issues

(a) Withholding Evidence from the Grand Jury

First, defendant assigns as reversible error the fact that the district attorney failed to subpoena, for purposes of the grand jury hearing, defendant's girlfriend and others who did volunteer work on his campaign. Defendant claims that their testimony was material and could have influenced the grand jury's

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Footnote 23: In his reply brief defendant cites us to *People v. Trimble*, 18 Cal.App.2d 350, 351, which held that a crime is classified as a felony or misdemeanor according to the sentence imposed. If a misdemeanor sentence is imposed (time in county jail) the offense will be deemed a misdemeanor. However, defendant forgets that imposition of sentence was *suspended* here. When imposition of sentence is suspended, and a period of "local time" serves as a condition of probation, as it did here, such "local time" confinement cannot be considered as an imposed sentence. (*People v. Esparza*, 253 Cal.App.2d 362, 364, 365.) Therefore, the offense cannot be classified as a misdemeanor merely because local time is served as a condition of probation. (*Id.*)

decision whether or not to indict him. Herein, defendant relies on **Johnson v. Superior Court**, 15 Cal.3d 248. In **Johnson**, defendant's testimony at his preliminary hearing persuaded the magistrate to drop the charges against him; yet, when the district attorney sought an indictment on the same charges, he failed to disclose to the grand jury the content of defendant's statements. With reference to such a practice, the Supreme Court held that "[w]hen a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated . . . to inform the grand jury of its nature and existence." (Id. at p. 251; emphasis added.)

First, the mandate in **Johnson** applies only to grand jury proceedings that take place after September 19, 1975. (**People v. McAlister**, 54 Cal.App.3d 918, 926.) Because the grand jury here met in early August of 1975 and returned an indictment against defendant on the 13th of that month, **Johnson** is chronologically inapplicable. However, even if **Johnson** were to apply, we still cannot agree with defendant that error was committed in not utilizing the testimony of his volunteer campaign force. Defendant himself was allowed to testify before the grand jury concerning the number of volunteers who worked for him and the type and amount of work they performed. He even supplied the grand jury with a list of all their names. Had the grand jury wished to corroborate defendant's account from the volunteers themselves, it could have

subpoenaed them. (**People v. McAlister, supra,** 54 Cal.App.3d 918, 927.) So long as the basic information itself was revealed to the jury, which it was by defendant's own testimony, the district attorney's duty, if any, was discharged.

Further, we question whether this evidence can be viewed as "tending to negate" defendant's guilt. Defendant might have had hundreds of volunteers who worked around the clock on his campaign and still have utilized his county paid staff for more campaign duties. In light of the foregoing, we must reject defendant's contention that his conviction be overturned because his volunteer force did not testify before the grand jury.

(b) **Denial of Discovery of Certain Matters**

Defendant claims that his conviction should be overturned because the trial court denied discovery of certain matters. According to his brief, those matters are "other files involving the named members" of the so-called warring political factions in Orange County. He alleges that discovery of these "additional files . . . could have raised a stronger inference of [discriminatory prosecution] than was possible by only obtaining files which defendant could with particularity

identify." (Footnote 24) (Emphasis added.) Thus, defendant admits, and the facts demonstrate, that the trial court granted discovery on the discriminatory prosecution issue of those materials specified by the defendant, but not of those materials which defendant could not identify or specify.

In claiming that this action constitutes reversible error, defendant relies on **Murgia v. Municipal Court,** 15 Cal.3d 286. However, his reliance is misplaced, for in **Murgia** the defendant specified precisely what items he wished to discover. (**Id.** at p. 305, fns. 16, 17.) Here, defendant admittedly failed to specify to the trial court what additional materials he wanted. Likewise, his brief before this court fails to clarify the nature of his request. (Footnote 25)

In view of the foregoing uncertainty, we feel that the California Supreme Court's statement in **Hill v. Superior Court,** 10 Cal.3d 812, 817, is dispositive: "the [trial] court has discretion to deny discovery in the absence of a showing which specifies the material sought and furnishes a 'plausible justification' for

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Footnote 24: We note with interest that during oral argument, defendant states his desire to de-emphasize the "warring political factions" approach to his discriminatory prosecution claim and to call to our attention the importance of the personal animosity between himself and the district attorney. In light of this, we pause to wonder if defendant's argument re discovery still has significance.

Footnote 25: Defendant also failed to include in the record on appeal a copy of his discovery motion.

inspection. [Citations.]'' (Footnote 26) The trial court did not commit prejudicial error in refusing to order discovery of unspecified materials.

(c) **Exclusion of Certain Evidence**

Defendant believes that prejudicial error occurred when the trial court excluded, as being irrelevant, evidence that: (1) in 1971, he returned $1,970.74 of his personal salary to the county and, in 1972, $984.26; and (2) that he spent $11,000 less than his total appropriated budget in 1973-1974.

It is well established that the trial court is vested with wide discretion in deciding whether evidence is relevant or not. (**People v. Warner**, 270 Cal.App.2d 900, 908.) Defendant must demonstrate that discretion has been abused. (See **San Diego Gas & Electric Co. v. Davey Tree Surgery Co.**, 11 CVal.App.3d 1096, 1103.) As for the first piece of evidence, we fail to see how defendant's acts in 1971 and 1972 bear any relevance whatsoever to activities which occurred in 1974. The only reason we can surmise why defendant would want to introduce such evidence would be to demonstrate that he is basically a ''good guy'' and, therefore, could not be guilty of misusing public funds. However, past acts are inadmissible to prove good or bad character. (Evid. Code, § 1101; Witkin, Cal. Evidence, § 332.) As

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Footnote 26: This position has been very recently reiterated by our Supreme Court in *Griffin v. Municipal Court* (Dec. 12, 1977, L.A. 30804) ———Cal.3d———, wherein the defendants' list of items for discovery was found to be sufficiently specific.

for the fact that defendant underspent his 1973-1974 budget, we can only comment, that even if defendant spent only one dollar of his total budget yet spent it for a purpose not authorized by law, that he would still be guilty of violating section 424, subdivision (2). We find no reversible error here.

(d) **Inconsistent Verdicts**

Next, defendant attacks the verdicts as being: (1) in violation of the doctrine of collateral estoppel; and (2) inconsistent. He argues that his acquittal on charges of violating Penal Code section 72, presentation of fraudulent claims, collaterally estops his conviction of violating section 424, subdivision (2). He relies on **Ashe v. Swenson**, 397 U.S. 436, for support. In **Ashe**, however, the doctrine was utilized to prevent a subsequent retrial of a defendant on the same charges, and not to prevent his conviction on some counts and acquittal on others in the same prosecution. (Footnote 27) Because defendant fails to cite us to any authority which truly supports his contention, we reject it.

As for his claim that the doctrine of inconsistent verdicts precludes defendant's conviction of section 424, subdivision (2), while being acquitted of violating Penal Code section 72, the cases which defendant cites

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Footnote 27: In *Ashe*, defendant was accused of simultaneously robbing six individuals who were in one room at the time of the robbery. Defendant was first tried and acquitted of robbing one of the six. He was subsequently prosecuted for robbing another of the six, but the Court of Appeal declared that this later procedure had been collaterally estopped by the first.

indicate themselves the fallacy of his analysis. As stated in both **People v. Hickman**, 31 Cal.App.2d 4, 11, and **People v. Guerrero**, 22 Cal.2d 183, 189, "the test [of inconsistency] is whether or not the essential elements in the count wherein the defendant was acquitted are identical and necessary to proof of conviction on the guilty count." Further, " ' "if [such count] requires proof of a fact additional to those involved in the other an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other." ' " (**People v. Coltrin**, 5 Cal.2d 649, 660, revd. on other grounds, 49 Cal.2d 577, 593.) Penal Code section 72 provides in pertinent part, "Every person who, with **intent to defraud**, presents for allowance or for payment to any . . . county . . . authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is punishable . . ." (Emphasis added.) A violation of Penal Code section 72 cannot be accomplished without the requisite intent to defraud. No such intent, however, is reqired of a violation of section 424, subdivision (2). Therefore, a conviction under Penal Code section 424, subdivision (2) and an

As for his claim that the doctrine of inconsistent verdicts precludes defendant's conviction of section 424, subdivision (2), while being acquitted of violating Penal Code section 72, the cases which defendant cites indicate themselves the fallacy of his analysis. As stated in both **People v. Hickman**, 31 Cal.App.2d 4, 11,

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(e) **Delay in Indictment**

Defendant states that he was prejudiced by the 14-month delay between his activities and his indictment. He claims, because of the delay, that

witnesses forgot important details and two witnesses were unavailable to testify. As for his first point, defendant fails to substantiate, by reference to the record, such memory loss on the part of any witness. We, therefore, may disregard the point.

As for his second point, prejudice necessitating reversal of a conviction is demonstrated only when the witnesses "lost" were material. (**People v. Archerd**, 3 Cal.3d 615, 640.) The witnesses defendant claims were lost because of the passage of time were two of defendant's volunteer campaigners. We have already concluded that the testimony of the volunteers was not material to defendant's guilt because no amount of volunteer work could detract from the fact that some misuse of county staff occurred. The crime was not reported to the district attorney's office until July 1975. This accounts for the delay. (See **People v. Bethea**, 18 Cal.App.3d 930, 939.)

(f) Misinterpretation of Jury Instructions by One Juror

Defendant hopes to have his conviction reversed by offering the affidavit of one juror, (Footnote 28) Gloria Godfrey, to the effect that she misunderstood the jury instruction, in that "[i]f the Court had made it clear that he [the defendant] had to have actual knowledge and to authorize the campaign activity specifically, I would have voted not guilty on all counts." We have already concluded above that the jury instructions were

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Footnote 28: This affidavit was made part of defendant's motion for new trial, below, but it was ordered stricken by the trial court.

proper. It is settled law that jurors may impeach a verdict only by testifying as to objective facts (those detectable by the senses) and not by testifying as to their own mental processes or reasons for arriving at their verdict. (**People v. Hutchinson**, 71 Cal.2d 342, 350, cert. denied 396 U.S. 994; **People v. Stevenson**, 4 Cal.App.3d 443, 445.) Juror Godfrey's affidavit attempts to do exactly that which the law disallows; therefore, defendant's contention on this point is without merit.

(g) Bias of Certain Jurors

Finally, defendant asks us to reverse his conviction because he claims that certain members of the jury were biased against him. (Footnote 29) After filing this appeal, defendant presented us with a petition for a writ of habeas corpus based on the same allegation of jury bias. In response, we issued an alternative writ and an order of reference, and an evidentiary hearing will be conducted as to that matter. (Footnote 30) We, therefore, will consider the contention noted when it is presented after the hearing ordered and not here.

Finally, we turn to the two arguments which defendant has emphasized most throughout his appeal. He contends that his conviction should be reversed

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Footnote 29: This contention, like the one just discussed, is based on an affidavit by juror Gloria Godfrey.

Footnote 30: We denied defendant's motion to consolidate determination of the alternative writ with this appeal. (4 Crim. 9682.)

because he was discriminatorily selected for prosecution and because a conflict of interest prevented the district attorney's office from properly performing its duties during the investigation and prosecution of the case. Both of these grounds were urged by defendant in his pretrial motion to dismiss the indictment. The trial court responded to the contentions by concluding that "[t]he action taken by the District Attorney constitutes in the Court's judgment reasonable law enforcement, and hence, the showing is inadequate to rebut the presumption that official duty has been properly and Constitutionally exercised." The court also found that there was no invidious discriminatory prosecution. Accordingly, the motion to dismiss the indictment was denied.

5. Discriminatory Prosecution

Discriminatory prosecution constitutes adequate grounds for reversing a conviction (**People v. Winters**, 171 Cal.App.2d 876, 878) when the defendant proves: "(1) 'that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' " (**People v. Superior Court (Hartway), supra**, 19 Cal.3d 338, 348, citing **Murgia v. Municipal Court, supra**, 15 Cal.3d 286, 298.) The discrimination must be "intentional and purposeful." (**Murgia v. Municipal Court, supra**, 15 Cal.3d 286, 297.) Further, defendant must carry the burden of proof that

he has been deliberately singled out in order to overcome the presumption that "[prosecutorial] dut[ies have] been properly, and constitutionally exercised." (**In re Elizabeth G.**, 53 Cal.App.3d 725, 733.) With these rules in mind, we examine defendant's contentions and the evidence adduced at the hearing on the motion to dismiss the indictment.

Defendant attempted to portray himself as the innocent victim of District Attorney Hicks' deliberate scheme to "catch him" in some illegal activity. In this case, the activity was defendant's use of his staff for campaign work. He makes much of the fact that no other office holder has ever been prosecuted for such activity. He alleges that his prosecution was part of a systematic effort by the district attorney to prosecute members of a local political organization (of which defendant was a member) for a variety of crimes. He further alleges that those officials associated with the rival political group (of which Hicks is a member) committed similar acts, yet escaped prosecution at the hands of the district attorney. Finally, he contends that his prosecution was precipitated by personal animosity, which had been brought on by an eight-year long dispute between himself and Hicks.

As to his first claim, defendant is incorrect in stating that no other official has ever been prosecuted for using his staff in a political campaign. In **People v. Sperl, supra**, 54 Cal.App.3d 640, which was mentioned before, the defendant was convicted for utilizing county

marshals to make campaign telephone calls in behalf of the local incumbent. Also cited above was **People v. Holtzendorff, supra,** 177 Cal.App.2d 788, in which a Housing Authority official was prosecuted for using nineteen staff members to work on the campaign of an office holder. Therefore, defendant's argument that his prosecution was discriminatory in that no one else has been charged for a similar act is groundless.

As to his allegation that District Attorney Hicks deliberately prosecuted members of one political group, while allowing those of the rival group to escape punishment for similar acts, the evidence presented at the hearing revealed that few members of the latter group were prosecuted, while several of the former were. However, evidence also indicated that investigations were conducted of members of both groups, without discrimination, whenever complaints were filed against them, and, for a variety of seemingly sound reasons (i.e., insufficient evidence to convict) many members of the latter group were never brought to trial. (Footnote 31) While it might have been possible for the trial court to believe that a systematic plan of discriminatory prosecution was in operation, the court's review of the evidence "fail[ed] to reveal . . . that the District Attorney emabrked upon a systematic program of intentional and purposeful invidious discrimination."

Footnote 31: Defendant, himself, had, in 1969 and 1972, three complaints lodged against him in the district attorney's office which did not result in prosecutions.

We are required to accept the trail court's finding because it is supported by substantial evidence. This position is further bolstered by the fact that we are unpersuaded that defendant has met the heavy burden of proof placed on anyone who attempts to use the defense of discriminatory prosecution. (**In re Elizabeth G., supra,** 53 Cal.App.3d 725, 733.)

Finally, defendant claims that the animosity between himself and Hicks brought about his prosecution. The evidence indicates that there was a certain amount of friction between the two. They wre, indeed, members of rival political groups, and, from 1968 to 1975, did occasionally clash over the policies of the district attorney's office. (Footnote 32) That friction seemed strongest in 1975, when one of the leaders of defendant's group came under investigation by the district attorney's office. In June of that year, defendant and a number of other supervisors voted to have 22 investigators transferred from the district attorney's office to the sheriff's department. This action alarmed the district attorney, who believed that defendant and other board members were controlled by the individual who was then under investigation. District Attorney Hicks believed that the transfer was a deliberate attempt to stymie the investigation of this

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Footnote 32: Each year, the budget for the district attorney's office had to be approved by the board of supervisors. Defendant was opposed to the proposed expenditure of funds for the prosectuion of so-called victimless crimes.

individual. Thereafter, defendant and Hicks exchanged public insults and Hicks publicly announced his suspicions about defendant's motive in voting for the transfer. Our task here is to decide if the friction that existed between defendant and the district attorney brought about defendant's prosecution. This can best be accomplished by reviewing the evidence relative to how the prosecution began and how it proceeded.

In 1975, Michael Capizzi served as director of the "Special Operations" Division of the district attorney's office. One department in "Special Operations," called "Special Assignment," handled investigations of office holders. Capizzi testified at the hearing that "Special Assignment" investigations usually began with private citizen complaints or leads from various sources. Witness accounts of the offenses would then be taken and verified, and the "law" on the subject would be checked. Capizzi usually made the final decision to take a case to the grand jury. Hicks did not evaluate the "Special Assignment" cases, but he was kept informed of their progress.

The mid-1970's were busy times for the "Special Assignment" office. Many local officials, **on both sides of the political fence**, were being investigated and/or prosecuted for a variety of offenses. Among them were two members of the political group to which the district attorney belonged. (Footnote 33) Another investigation

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Footnote 33: One of the two, LeRoy Rose, was a member of the board of directors of that group.

by that office was based on a complaint against the Orange County Assessor's Office. It resulted in the prosecution of 11 officials and employees for using county time to distribute election materials. Apparently, no one was safe from the vigilant eye of the "Special Assignment" office.

In early July 1975, Robert Dougherty contacted Hicks with the information about defendant which Dawn Papp had reported. Hicks immediately turned the matter over to Capizzi, giving him no instructions relative to the case. Thereafter, the district attorney took no active role in the investigation or prosecution, except that he was informed of its progress and he was consulted once before the case was submitted to the grand jury. After hearing Ms. Papp's account, Capizzi reached a "preliminary analysis," if she was telling the truth, that the case was of sufficient magnitude to be brought before the grand jury. Capizzi then wrote to Jack Winkler of the Attorney General's Office to request the assistance of that office in the investigation and prosecution of the defendant. The Attorney General's Office sent three investigators to Orange County, but declined to assume the prosecution of the case because the district attorney's "past track record had been excellent in fairly and impartially investigating and prosecuting cases, and [the Attorney General's Office was] quite sure that [the district attorney's office] hanled this one in the same fashion."

Before deciding to take the case to the grand jury,

Capizzi discussed it with Hicks, two other members of the district attorney's staff, and investigators from the district attorney's and Attorney General's Offices.

At the hearing, Capizzi testified that he was aware of the differences between the defendant and Hicks, but that he was not at all influenced by this in his decision to bring the case before the grand jury. Hicks also testified, although he and defendant disagreed about policy and politics, that he had no personal animosity toward him.

The trial court found that no deliberate discrimination had taken place, and that the investigation and prosecution were proper. In our view, the above recited facts constitute substantial evidence to support the court's position. Therefore, we cannot agree with defendant that he was discriminatorily selected for prosecution.

6. **Conflict of Interest**

Defendant claims that a conflict of interest prevented District Attorney Hicks from properly performing his duties in relation to the prosecution. In his brief before us, defendant cites as bases of the conflict: (1) the fact that a civil suit between an association of county employees and the County of Orange was pending during the investigation and

prosecution; (Footnote 34) (2) the fact that several members of the district attorney's office had to testify during the proceedings; and (3) the personal animosity between defendant and Hicks.

The law on conflicts of interest is contained primarily in **People v. Superior Court (Greer)**, 19 Cal.3d 255. Therein, the mother of a murder victim worked for the district attorney's office, in the department charged with the prosecution of the defendant. The victim's wife and her companion (Greer) were held to answer for the crime. The death had allegedly been brought on by a dispute between the victim and his wife over the custody of their child. The victim's mother stood to gain custody of the child if the couple were convicted. There were a number of other entanglements, all of which persuaded the trial court that the district attorney should withdraw from the case. The court then ordered the Attorney General to conduct the prosecution, but he refused to do so on the ground that the separation of powers doctrine prevents such "re-assignment" of prosecutions even when the conflict of interest present was serious.

The Supreme Court responded that while conflicts

Footnote 34: In his reply brief, defendant also cites two other cases which involved the district attorney and himself. Because those cases were not included by defendant in his earlier brief, we need not consider them. (Defendant claims they are mentioned in the body of his pretrial motion to dismiss, but we are unable to find such a reference.) However, the analysis we apply to the case mentioned above applies equally to these other two.

serious enough to require disqualification of the district attorney are rare, "a trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect . . . his ability to impartially perform the discretionary functions of his office." (Id. at p. 269; emphasis added.)

It is important to note that Greer merely states that the trial court may, within its discretion, excuse the district attorney, not that it must. Because the decision whether or not to disqualify is within the discretion of the court, it may be overturned on appeal only if this discretion is abused.

Turning first to defendant's reference to the suit brought by the employees' association, we note that the Supreme Court in Greer stated, "[n]or should a prosecutor try a defendant with whom he is embroiled in civil litigation." (Id. at p. 261, relying on Sinclair v. State, 278 Md. 243 [363 A.2d 468], and Ganger v. Peyton, 379 F.2d 709.) In Sinclair, the defendant was accused of passing bad checks. The prosecutor was also the attorney for the bank upon which the checks were drawn. In addition, in an earlier civil suit, brough against the defendant, the district attorney had represented the opposing party and had warned defendant, if he persisted in filing an appeal in that suit, that the district attorney would prosecute

defendant for passing bad checks. Under these circumstances, the court found that an evidentiary hearing into the conflict of interest issue was necessary. In Ganger, the state prosecuting attorney assigned to a wife beating case also represented the wife in her divorce action that was based on the beating incident. The defendant claimed that the attorney offered to drop the criminal charges against him if he would agree to a property settlement favoring the wife (the attorney's fee in the divorce action depended on the amount of the wife's settlement). The court found that there was a conflict of interest.

The facts in Greer, Sinclair and Ganger reveal intense personal involvement of district attorneys in the very cases they are called upon to prosecute. In contrast, the suit between the employees' association and the county involved an effort to compel the board of supervisors to grant pay raises to deputy district attorneys and public defenders commensurate with the raises enjoyed by other county workers. Because of the anture of defendant's position as supervisor, such suits wre not uncommon, and the fact that this particular one occurred does not, in itself, establish a conflict of interest, as it did in Greer, Sinclair and Ganger.

Next, defendant claims that the district attorney's office should not have prosecuted the case because Hicks, Capizzi and several investigators from the district attorney's office were called to testify. We note first that the members of the district attorney's office

testified only at the pretrial discriminatory prosecution hearing and not at the trial on the merits. We further observe that their testimony at the pretrial motion was necessitated by the very nature of defendant's claim of discriminatory prosecution. It is apparent to us, because ". . . a claim of discriminatory prosecution generally rests upon evidence completely extraneous to the specific facts of the charged offense . . ." (**Murgia v. Municipal Court, supra,** 15 Cal.3d 286, 293, fn. 4), that defendant was in no way denied a fair trial on the merits of his guilt or innocence by the testimony of the district attorney staffers at the pretrial motion hearing.

Finally, defendant contends that the differences of opinion between himself and Hicks constituted a conflict of interest which tainted his prosecution. (Footnote 35) We have already discussed the presence of substantial evidence to the contrary. The investigation and prosecution proceeded as did most others in the "Special Assignment" office. There was no evidence that the district attorney "went after" the defendant in an effort to "get him" for some offense. In fact, Capizzi passed up three prior opportunities to prosecute defendant for trespassing and falsification of a letter. In addition, both Hicks and Capizzi denied being influenced by the confrontations between the

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Footnote 35: Defendant claims that prosecutor Jack Ryan was biased against him. To support this, he contends that, at some point, Ryan called him an "asshole." However, defendant fails to cite us to such a reference in the record, and we are not obliged to accept his undocumented version of the facts.

district attorney and defendant. Such confrontations can be expected when one person or body holds the purse-strings of another. By no stretch of the imagination can we view the entanglements between Hicks and defendant here to be of the number or magnitude as those that existed in **Greer**. We therefore agree with the trial court that the prosecution was fair.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ McDaniel, J.

We concur:

/s/ Kaufman, Acting P.J.

/s/ Morris, J.

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

vs.

ROBERT WILLIAM BATTIN,
Defendant and Appellant

4 Crim. 9051
(Super.Ct. No. C-34528)

MODIFICATION OF OPINION AND DENIAL OF APPELLANT'S PETITION FOR REHEARING

MODIFICATION of the opinion heretofore filed in this case on January 18, 1978, is made as follows:

On page 1, line 7, the following sentence is deleted: "The court later dismissed the theft count pursuant to the defendant's motion."

In its place and stead, please substitute the following sentence: "The court later dismissed the theft count pursuant to the People's motion."

Except for the modification by the striking of the language as set forth above, and by the substitution and addition of the language hereinabove set forth, the

opinion previously filed remains unchanged.

The appellant's petition for rehearing is denied.

CERTIFIED FOR PUBLICATION.

/s/ McDaniel, J.

We concur:

/s/ Kaufman, Acting P.J.

/s/ Morris, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

APR 13 — 1978 I have this day filed Order HEARING DENIED In r: 4 Crim. No. 9051 People of the State of California vs. Robert W. Battin, Esq.

Respectfully,

G. E. BISHEL, Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On July 12, 1978, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Clerk of Court of Appeal
Fourth Appellate District
State Building, Room 640
San Bernardino, CA 92401

Evelle J. Younger
Attorney General of Calif.
Att'n: M. Howard Wayne
110 West "A" St., Ste. 600
San Diego, CA 92101

Clerk of Superior Court
County of Orange
700 Civic Center Dr. West
Santa Ana, CA 92701

Cecil Hicks Esq.
District Attorney,
County of Orange
700 Civic Center Dr. West
Santa Ana, CA 92701

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED on July 12, 1978, at Santa Ana, California.

JACK GALLAGHER